No. 97-1121

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**City of Chicago,**

*Petitioner,*

v.

**Jesus Morales, *et al.*,**

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Illinois**

## BRIEF OF RESPONDENTS

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# BRIEF OF RESPONDENTS

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## STATEMENT

The ordinance challenged in this case was adopted by the Chicago City Council in June 1992. Prior to adopting the ordinance, the City Council's Committee on Police and Fire conducted hearings about street gangs in City neighborhoods.

More than thirty citizens testified at the hearings. These citizens described gang members committing crimes such as drug-dealing, prostitution, and robbery. *E.g.*, Supp. R. II at 32.

Many witnesses described steps they had taken, individually and in groups, to effectively combat gang presence. A member of the Northwest Neighborhood Federation reported that the Federation had "evicted five gangs from five different [Chicago] communities." Supp. R. I at 50. Others testified that they reported crime by gang members, and testified against them in court. Supp. R. I at 71, 115; Supp. R. II at 23. One witness from a community group described how she had participated both in "positive loitering" to combat gang presence and also in neighborhood foot patrols, Supp. R. I at 113, 115; she also videotaped gang activities and showed the tapes to the police, Supp. R. I at 117. Various persons described confronting gang members directly and regularly. Supp. R. I at 75, 80. Finally, some persons identified gang members to police, *e.g.*, Supp. R. I at 126; and many routinely called police when gang members were present in their vicinity, Supp. R. I at 67, 70, 90, 94, 105, 108.

Witnesses and aldermen alike testified as to their frustration about the lack of police responsiveness to the incidence of serious and already illegal activities of the gang members. Oftentimes, the police are called but they take too long to respond. Supp. R. I at 61, 70, 80, 108. Some witnesses complained that the police simply did not show up at all when called. One witness, for example, described gang members congregating in a playlot late at night, blowing their whistles; the police told her that "until they break in and stab you, we aren't going to do anything." Supp. R. II at 36; *see also* Supp. R. I at 93-94.

There was related testimony that stepped-up and aggressive police presence in areas of serious gang activity could be very effective in reducing or eliminating gang activity. *E.g.*, Supp. R. I at 79. One witness strongly supported beefed up foot patrol presence in affected neighborhoods. Supp. R. I at 83-85.



Various reservations were expressed about the ordinance as an appropriate response to the problems posed by gang presence. For example, one witness expressed concern that the ordinance was "a little broad and a little vague." Supp. R. I at 78. A second witness emphasized "that people have to gather," and seemed to be worried that the ordinance might inappropriately be applied to "young people on our block . . . going to school." Supp. R. I at 97. And a third witness thought that the ordinance would be ineffective, and that a broader-based approach was necessary. Supp. R. I at 144-46.

One witness suggested that the ordinance was not necessary to combat the activities complained of at the hearings, because sufficient laws already existed on the books. Supp. R. I at 97, 101. At least three aldermen from high-crime wards on the south and west sides of Chicago vigorously echoed this theme. Alderman Steele, now a Circuit Court Judge, remarked that the City of Chicago already had a curfew law, a safe school law, and other laws on the books, and implied that they were being inadequately enforced. Supp. R. II at 43-44, 164. Alderman Shaw echoed this point, noting that there were already laws "dealing with drugs, recruitment [and] intimidation." Supp. R. II at 51. Alderman Jones remarked that the prospect of enforcement of the ordinance reminded him of the days of street sweeps in the early 1980s in Chicago. Supp. R. II at 70. And Alderman O'Connor chastised the State's Attorney of Cook County for encouraging the passage of a new anti-gang law when the county itself "ha[s] tools readily available to go after the recruitment of gang members as opposed to us sweeping the streets of known gang members." Supp. R. I at 10. He also noted more generally that "their [sic] are readily available tools, state and county level, which are not even being utilized." Supp. R. I at 11.

Finally, Chicago Police Deputy Superintendent Gerald Cooper testified. He was the only representative of the

Chicago Police Department, and the only person with an extensive professional policing background, who testified before the Committee. He began by acknowledging the serious problems posed by gang activities in neighborhoods. Supp. R. II at 173. He acknowledged that the ordinance could provide "another tool" for law enforcement, Supp. R. II at 178, but expressed concern that the police department had "been down this road before." Supp. R. II at 178. Cooper said that the ordinance would be "of some benefit," but only where officers had "advance prior knowledge of the background and the history of particular individuals." Supp. R. II at 179. He suggested that officers would not be able to approach a group and determine which persons were gang members and which were not, Supp. R. II at 179-80, and warned that "innocent or lawful people" would be arrested under the ordinance, Supp. R. II at 180. Cooper observed that, in about 90 percent of the examples of gang conduct given at the hearing, gang members would be subject to arrest under existing laws. Supp. R. II at 181-82. Finally, in answering whether the ordinance would eliminate youths loitering on street corners, Cooper responded: "I don't think it will." Supp. R. II at 184.

After these hearings, the Chicago City Council adopted the loitering ordinance. It is triggered when any person reasonably believed by a police officer to be a gang member is found loitering with any other person or persons in any public place. Pet. App. 61a. In such a circumstance, the ordinance requires the officer to order all the persons to "disperse and remove themselves from the area." *Id.* The officer is further required to arrest any person who does not "promptly" obey the order. General Order 92-4, sec. IV.C.2.a., Pet. App. 72a.[1]

[1] Citations to the appendix to the City's petition for certiorari appear as "Pet. App.," and citations to the City's brief in this Court appear herein as "Br." Citations to *amicus* briefs in support of the City appear as follows: to the Brief of



The ordinance was in effect for roughly three years. Over that time, the City reports that approximately 45,000 move on orders were issued and obeyed. Almost as many arrests were made. Br. 16.

In *City of Chicago v. Youkhana*, the Circuit Court of Cook County, in a written opinion, granted the motion to dismiss of fourteen defendants who had been arrested for violating the ordinance.[2] The court held that the ordinance was unconstitutional on three grounds. First, it held that the ordinance was void for vagueness, both because it failed to give notice of what conduct it prohibited, and because it vested too much discretion in police officers. Pet. App. 44a-53a. The court determined that the ordinance was not susceptible of a limiting construction. Pet. App. 52a. Second, the court determined that the ordinance unconstitutionally criminalized status by criminalizing the mere presence of gang members in public. Pet. App. 54a. Finally, the court held that the ordinance, in "reach[ing] all forms of protected conduct," was overbroad, in violation of both the First Amendment and Article 1, Section 5 of the Illinois Constitution. Pet. App. 56a-58a. The court observed that criminal laws already in existence provided police officers with sufficient authority to arrest persons who

the United States, "Br. U.S.," and to the Amicus Brief of the Chicago Neighborhood Organizations, "Br. CNO." Citations to the Brief of the Chicago Alliance for Neighborhood Safety as *Amicus* in support of Respondents appear as "Br. CANS." Finally, citations to the City's briefs in the state courts appears as follows: to the City's brief in the Illinois Supreme Court, "Pet. Br. Ill. S. Ct."; to the City's opening brief in the Illinois Appellate Court, "Pet. Br. Ill. App. Ct.," and to its reply, "Pet. Reply Br. Ill. App. Ct."; and to the City's trial court brief, "Pet. Br. Tr. Ct."

[2] In addition to this circuit court decision, twelve other circuit court judges decided cases involving the ordinance. Eight of these judges ruled the ordinance vague on its face; one ruled it vague as applied. The ordinance was upheld by two of these judges. Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Cal. L. Rev. 379, 384 n. 26 (1995).

actually commit crime and to protect the public from conduct that is truly illegal. R. 115.

The appellate court unanimously affirmed. First, it held that the ordinance was overbroad in that it infringed upon the rights of assembly, association, and expression as guaranteed under the First Amendment. Pet. App. 25a.[3] Second, the court held that the ordinance was void for vagueness. Pet. App. 31a-33a. Third, it agreed with the trial court that because the ordinance was "triggered when a gang member is loitering," it effectively criminalized status rather than conduct, in violation of the Eighth Amendment. Pet. App. 33a-34a. Finally, the court held that the ordinance was a "transparent attempt to avoid the probable cause requirement" and thus violated the Fourth Amendment. Pet. App. 35a.[4]

The City appealed to the Illinois Supreme Court, which, on October 17, 1997, unanimously affirmed the judgment of the appellate court. Like the courts below, the Illinois Supreme Court found that the ordinance provided the police no guidelines for determining when persons have apparent purposes, that it thus amounted to a grant of unfettered discretion to police officers, and that it was accordingly void for vagueness. Pet. App. 15a. In addition, the court specifically held that the ordinance failed to notify persons of ordinary intelligence what formerly innocent (or lawful) conduct it was criminalizing, Pet. App. 9a, and that it was

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[3] The appellate court also struck the ordinance down on an independent state ground, as violative of the state right to assemble in a peaceable manner. Pet. App. 27a.

[4] Upon affirming the circuit court decision, the appellate court consolidated the appeals taken by the City of cases in which a circuit court had ruled the ordinance unconstitutional, and affirmed on the basis of *Youkhana*. *City of Chicago v. Ramsey* (Pet. App. 39a-40a). These were cases involving sixty of sixty-six Respondents. In addition, the appellate court consolidated all appeals from judgments of conviction under the ordinance, and reversed those judgments, again on the basis of *Youkhana*. *City of Chicago v. Morales* (Pet. App. 37a-38a). These appeals involved the other six Respondents.



void for vagueness on this ground as well. Pet. App. 14a. Like the courts below, the Illinois Supreme Court held that the move-on order requirement did not cure the ordinance's vagueness defects, Pet. App. 13a, and that the ordinance did not admit a limiting construction, Pet. App. 16a. The court also held that the ordinance violated substantive due process in that it unreasonably and arbitrarily interfered with liberty interests protected by the Due Process Clause. Pet. App. 17a-18a. The court emphasized that "[t]he city is not helpless in its war against the criminal activity of gangs . . . [because] [m]any of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. 19a. The court specifically identified relevant Illinois criminal statutes, including prohibitions on intimidation (720 ILCS 5/12-6); compelling organization membership (720 ILCS 5/12-6.1); aggravated intimidation (720 ILCS 5/12-6.2); and mob action (720 ILCS 5/25-1). The court did not reach Respondents' claims arising under the First, Fourth, and Eighth Amendments.

## SUMMARY OF ARGUMENT

In 1992, just prior to the dramatic decline in crime nationally, the City of Chicago passed a vaguely worded loitering law that is sweeping in its scope. Its stated purpose is prophylactic – to prevent crime before it occurs by dispersing from public places on pain of arrest persons who an officer believes have "no apparent purpose." While supposedly directed at street gangs, the ordinance explicitly provides that anyone – including a parent, sibling, spouse or close friend – also is subject to the humiliation of banishment or arrest if they are "with" a suspected gang member in a public place.

The City's ordinance simply cannot be reconciled with our constitutional tradition, which protects the rights of people to freedom of movement and association. These guarantees always have included the right to freely use the

public ways, parks and other forums of our cities for the lawful purposes of engaging in family activities, and communicating with others about matters both personally important and of public concern. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

While rhetorically dressed in the garb of community-oriented policing, Chicago's loitering law in reality is nothing less than a return to the street sweeping laws of America's past. *Papachristou*, 405 U.S. at 171. And despite the City's claims of having created a novel ordinance, in vaguely prohibiting the act of simple loitering, the ordinance is no different in substance than its discredited ancestors. In fact, this law is even more threatening to individual liberty because it is not limited to the "criminal" that the City fears, but instead extends to anyone who is simply with a suspected gang member in public, no matter why.

For over 60 years, the decisions of this Court have condemned the inherent vagueness of loitering laws like Chicago's. *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940); *Shuttlesworth*, 382 U.S. at 90-91; *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971); *Papachristou*, 405 U.S. at 162-71. The ordinance's vague prohibition on behavior without an apparent purpose fails to provide any standard by which people can measure their conduct. *Papachristou*, 405 U.S. at 165; *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Similarly, the law provides no guidance to police officers. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983).

The City claims that any vagueness in the term "loitering" is cured because the ordinance's move on order will inform people of what they need to do to avoid arrest – move on. However, because such an order does not inform a person of what they did to justify the order, or what to refrain from doing in the future, or whether to make an informed



choice to peaceably submit to arrest and challenge the charges in court, the ordinance still fails to provide fair notice. *United States v. Lanier*, 117 S. Ct. 1219 (1997). The ordinance is vague in all of its applications, and it is therefore unconstitutional on its face. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

This Court has recognized that loitering laws also implicate the fundamental right of free movement in public places and forums. *Kolender*, 461 U.S. at 358. That freedom, and its corollary right to remain innocently on the street, is of considerable vintage, and has been identified by this Court as an aspect of substantive due process in a line of cases beginning with *Williams v. Fears*, 179 U.S. 270, 274 (1900), running through *Kent v. Dulles*, 357 U.S. 116, 126 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964), and culminating – for present purposes – with *Kolender*, 461 U.S. at 358. The City dismisses freedom of movement as being limited to the right "to travel abroad or from one state to another." However, our nation's history and tradition – as well as this Court's cases – make clear that the right to cross borders is an extension of the more basic right to move within them. Under the ordinance, this right of free movement is summarily suspended for substantial numbers of Chicago's citizenry, who are denied the simple freedom to stand with another in public if a police officer cannot discern their purpose and believes that at least one person is a gang member.

The City's justification for its prophylactic measure, that "standing around . . . under at least some circumstances" (Br. 17) may give rise to illegal behavior in the indefinite future, serves only to underscore the absence of narrow tailoring. Indeed, as the Supreme Court of Illinois found, the means and ends of the ordinance are so disconnected that it

cannot pass even the rational basis test required of all legislation under the Due Process Clause.

Loitering laws also abridge fundamental rights of speech and association. *Kolender*, 461 U.S. at 358; *Shuttlesworth*, 382 U.S. at 90-91. By interfering with the peaceful enjoyment of public streets, sidewalks, and parks, the ordinance substantially burdens both intimate and expressive association. *See Roberts*, 468 U.S. 618-19. The City dismisses the ordinance's burden on intimate association by unjustifiably defining the right as one that cannot be exercised out of doors; and the City trivializes the burden on expressive association by pretending that the exercise of such associational rights will always be apparent to police. But when one lays the ordinance over the array of intimate and associational conduct that human experience teaches us occurs in the traditional public fora of the streets, sidewalks, and parks, the ordinance's unacceptable burden on protected association is manifest. Because of its substantial overbreadth, the ordinance is unconstitutional on its face.

The Chicago ordinance violates the Eighth Amendment, as well, by criminalizing status in the absence of any *actus reus*. The law banishes from the public way suspected gang members, and any person who for any reason is with a suspected gang member, not because of what they have done, but instead because of who they are. The failure to exhibit an "apparent purpose" at every moment that one is in public cannot be the "act" needed to save the ordinance. This "act" includes such ubiquitous, reflexive, and virtually involuntary conduct as talking, strolling, eating, and just enjoying the fresh air. If the law were otherwise, the government might ban the status of narcotics addiction when combined with the "act" of getting out of bed or failing to leave the state; this, of course, would directly contravene *Robinson v. California*, 370 U.S. 660 (1962).



Finally, the Chicago ordinance violates the Fourth Amendment because it is, in the words of the Appellate Court of Illinois, "a transparent attempt to avoid the probable cause requirement." Pet. App. 35a. The law makes it a crime to look suspicious; that is, it authorizes arrest based upon the City's generic suspicion that someone might commit some unspecified crime sometime in the future if that person were allowed to continue to associate in public with a person who is suspected of belonging to a gang. Indeed, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it occurs." Br. 10, 14. This evasion of the probable cause requirement violates core Fourth Amendment principles. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *see also Terry v. Ohio*, 392 U.S. 1 (1968).

In sum, this Court should affirm the unanimous judgment below striking down the Chicago Ordinance, because it violates the First, Fourth, Fifth, Eighth, and Fourteenth Amendments.

## ARGUMENT

### I. THE CHICAGO ORDINANCE IS VOID FOR VAGUENESS.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104 (1972). These standards are not to be mechanically applied. Rather, "[t]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Village of Hoffman*

*Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

The factors that this Court has deemed relevant in making such determinations demand a high degree of specificity in the language of the City's ordinance. *See id.* at 455 U.S. at 498-99 (listing factors). The City's law focuses not on the narrow subject matter of economic regulation but rather on the broad range of all activity in which people engage while in public. It imposes criminal as opposed to civil penalties. And the ordinance contains no scienter or *mens rea* requirement that "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.* at 499.

Most importantly, the demand for clarity of language is great because the law threatens to inhibit the exercise of other constitutionally protected rights. *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Hoffman Estates*, 455 U.S. at 499. A loitering law of this type has "the potential for arbitrarily suppressing First Amendment liberties" and "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358.

In assessing the "nature of the enactment," this Court should consider the inherent operation of a loitering law. While some of these laws are more definite in their prohibition and more targeted to core criminal conduct,[5] Chicago's ordinance prohibits only the amorphous act of loitering. It is, therefore, a prohibition reminiscent of the most primitive and sweeping of the "street-cleaning" laws of

[5] For example, some laws contain requirements that the person engage in conduct evidencing an intent to commit a specific illegal act. *E.g.*, *City of Seattle v. Slack*, 784 P.2d 494 (Wash. 1989) (intent to solicit an act of prostitution); *People v. Smith*, 378 N.E.2d 1032 (N.Y. 1978) (purpose of soliciting an act of prostitution); *City of Tacoma v. Luvene*, 827 P.2d 1374 (Wash. 1992) (manifesting the purpose of engaging in drug-related activity); *People v. Superior Court (Caswell)*, 758 P.2d 1046, 1049 (Cal. 1988) (purpose of "engaging in or soliciting any lewd or lascivious or any unlawful act").



our nation's past. *See* John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 216 (1985) (noting the potential of *Papachristou*-type laws to be used as street-sweeping devices and their susceptibility to vagueness challenges).[6]

A law prohibiting a person from remaining in one place "without an apparent purpose" is not a law to which people can conform their conduct. Virtually all the time, people have purposes for what they are doing. But often, involuntarily and unconsciously, they simply do not overtly display them. Despite this obvious fact about human conduct, Chicago's ordinance imposes the difficult, if not surreal, duty to ever be vigilant to advertise one's purposes. Further, this Court should be mindful that, in addition to possible arrest and prosecution, the law requires, in the first instance, the summary imposition of a sanction – dispersal from public by a police officer. Since most citizens will simply disperse, discriminatory and arbitrary enforcement may more easily occur because street level law enforcement decisions are completely shielded from prosecutorial and judicial review.

For over half a century, this Court has unequivocally disapproved, as unacceptably vague, statutory language like that in Chicago's ordinance because it effects broad and vague restrictions on persons "loitering" in public places.[7] In

[6] Chicago's ordinance itself was used as a street-sweeping device. In 1994, the Chicago Police Department announced Operation EDGE, as part of its efforts to "enforc[e] drug laws and the anti-gang loitering ordinance." *Cops Taking EDGE in Crime Battles*, Chi. Sun-Times (July 5, 1994) at 14. Operation EDGE involved flooding "hot spots" by as many as sixty uniformed officers, over a several-hour period, and the making of dozens of arrests. *Id.* In one such sweep, out of one hundred arrests made, sixty-nine were for gang loitering. *Sweep Nets 100 Arrests*, Chi. Sun-Times, Metro Briefings Section (Feb. 6, 1995).

[7] Indeed, even before this Court's decision in *Papachristou*, such vague and broad proscriptions gave lower federal and state courts no more pause than they have given this Court, and were regularly struck down on vagueness (often, among other) grounds. *E.g.*, *United States v. Kilgen*, 431 F.2d 627, 628 (5th Cir.

*Thornhill v. Alabama*, 310 U.S. 88 (1940) a state law prohibited, in part, "any person or persons . . . *without just cause or legal excuse* therefore, [from] . . . loiter[ing] about any place of lawful business . . . or picket[ing]" (emphasis

1970) (ordinance deeming a vagrant any person "wandering or strolling around from place to place without any lawful purpose or object" and any "habitual loafer"); *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) (statute deeming a vagrant "any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a giving a good account of himself); *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931) (statute making it a misdemeanor to "habitually loaf, loiter, and/or idle upon any public street or highway or in any public place"); *Kirkwood v. Loeb*, 323 F. Supp. 611, 611-13 (E.D. Tenn. 1971) (ordinance prohibiting, *inter alia*, loitering "without any legitimate business or purpose . . . on the sidewalks or public streets . . . after having been directed by an officer or member of the police force to move away therefrom"); *Gordon v. Schiro*, 310 F. Supp. 884, 887 (E.D. La. 1970) (deeming vagrants any persons who "loiter around any public place of assembly, without lawful business or reasons to be present"); *Landry v. Daley*, 280 F. Supp. 968, 969 (N.D. Ill. 1968) (prohibiting any persons from, *inter alia*, "wandering about the streets . . . without being able to give a satisfactory account of themselves"); *City of Columbus v. Thompson*, 266 N.W.2d 571, 572 (Ohio 1971) (prohibiting "any person who wanders about the streets . . . without any visible or lawful business and who does not give satisfactory account of himself"); *State of Maine v. Aucoin*, 278 A.2d 395 (Me. 1971) (prohibiting any person from "loiter[ing] in, on, or adjacent to any streets, ways, or public places, in the [City of Portland]"); *State of Wisconsin v. Starks*, 186 N.W.2d 245 (Wis. 1971) (prohibiting any person from "loitering near any structure, vehicle or private grounds . . . without the consent of the owner" unless able to account for his presence); *State of New Hampshire v. Hudson*, 274 A.2d 878 (N.H. 1971) (prohibiting any person, "after being warned by police officer, [from] loiter[ing] on sidewalks in the city in front of business establishments, public buildings or houses of worship"); *City of Portland v. James*, 444 P.2d 554 (Or. 1968) (prohibiting any person from "roam[ing] or be[ing] upon any street, alley or public place [between the hours of 1 and 5 o'clock A.M.]"); *City of Seattle v. Drew*, 423 P.2d 522, 523 (Wash. 1967) (prohibiting any person from "wandering or loitering abroad . . . from one-half hour after sunset to one-half hour before sunrise . . . [without giving] a satisfactory account of himself upon the demand of any police officer"); *People v. Diaz*, 151 N.E.2d 871 (N.Y. 1958) (prohibiting any person from "loung[ing] or loiter[ing] about any street or street corner in the City of Dunkirk"); *Commonwealth v. Carpenter*, 91 N.E.2d 666 (Mass. 1950) (prohibiting any person from "willfully and unreasonably saunter[ing] or loiter[ing] . . . for more than seven minutes after being directed by a police officer to move on"); *Territory of Hawaii v. Anduha*, 31 Haw. 459 (Haw. 1930) (same ordinance as in 48 F.2d 171).



added). In striking down the law on its face because of the breadth of its burden on speech and assembly, the Court concluded that the qualification "'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation," precisely because "the words themselves *have no ascertainable meaning either inherent or historical*." (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453-455.) *Id.* at 100 (emphasis added).[8]

Two decades later, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), the Court was faced with an ordinance containing another vague and broad proscription on loitering in public. That ordinance forbade "any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." *Id.* at 90. The Court noted that the literal terms of the ordinance contained an unquestionable "constitutional vice," in that they did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Black, J.).[9]

In *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), the Court was faced with a loitering ordinance penalizing "any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business . . . ." This ordinance

[8] The Court's assessment of the ambiguity of the law's language was essential to the overbreadth analysis. *See Hoffman Estates*, 455 U.S. at 494 n.6 (in determining whether an enactment is overbroad, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment").

[9] The City implies that the vice of the *Shuttlesworth* ordinance, as written, was that it prohibited *standing* in public, in violation of the First Amendment. Br. 32. But the *Shuttlesworth* passage in question – that the prohibition on "stand[ing] or loiter[ing]" was not "clearly defined" – forces another conclusion. Since no one can seriously maintain that the term "stand" is vague, or not clearly defined, the Court's concern in this passage must have been with the vagueness of the term "loiter."

was deemed "vague and lacking ascertainable standards of guilt." *Id.* at 545. The Court reversed the conviction, holding that, as to the defendant in that case, the ordinance gave "insufficient notice" that it prohibited him from letting a friend out of his car and then remaining in the car talking on a car radio.[10]

Finally, the Court held the loitering law in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), unconstitutionally vague. That law prohibited, among other things, "wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 156 n. 1. The Court struck the ordinance down as void for vagueness, both in that it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden . . . and because it encourage[d] arbitrary and erratic arrests and convictions." *Id.* at 162 (citations omitted). The "restriction" that the wandering or strolling had to be "without any lawful purpose or object" did nothing to cure the ordinance's inherent vagueness; rather, it served simply to set "a trap for innocent acts." *Id.* at 164.

Thus, loitering ordinances that prohibit the simple act of "loitering," without further qualification or definition (*Shuttlesworth*), as well as those that criminalize loitering without lawful purpose (*Thornhill*, *Palmer*, and *Papachristou*) have consistently been considered impermissibly vague by this Court. Chicago's ordinance is likewise impermissibly vague. This Court, therefore, should declare the Chicago ordinance unconstitutional on its face,

[10] This "as applied" approach to correcting abuses of the law is the one recommended by the Solicitor General. Br. U.S. 10, 17 n. 13. But as *Palmer* illustrates, this Court has been down that road before. With inherently vague laws, unconstitutional in each and every application, the remedy is clear – facial invalidation.



because it "is impermissibly vague in all of its applications," *Hoffman Estates*, 455 U.S. at 494.[11]

**A. The Ordinance Fails to Provide Adequate Notice.**

This Court has repeatedly struck down vague statutes because they fail to provide persons with proper notice of prohibited conduct. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 & n. 3 (1972) ("Vague laws may trap the innocent by not providing fair warning.") (collecting cases); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks, street corners . . . and there conduct themselves in a manner annoying to persons passing by" held unconstitutionally vague because "it subjects the exercise of the right to assembly to an unascertainable standard"); *Papachristou*, 405 U.S. at 162 (vagrancy ordinance held void for vagueness because "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'") (citation omitted). As shown below, Chicago's ordinance, because it does not provide any meaningful standard to which persons may conform their conduct, fails to provide fair warning.

The ordinance requires a police officer who observes a person he reasonably believes to be a gang member "loitering" in any public place with one or more persons to order all such persons to disperse and remove themselves from the area. The police officer is then expressly required to

[11] In fact, at least so far as fair notice goes, Chicago's ordinance is even more onerous than the ordinances in *Thornhill*, *Palmer*, and *Papachristou*. At least the latter ordinances premised criminal liability on the *actual* purpose of the suspected loiterer. Here, the requirement is having an "apparent" purpose. Thus, Chicago's ordinance, unlike the laws at issue in this Court's prior loitering cases, does not allow explaining one's real purpose. In the City's words "it is immaterial [to enforcement of the ordinance] whether an individual may be able to explain his presence in a public place to the satisfaction of a police officer." Pet. Br. Ill. S. Ct. 52. Coupled with the lack of *mens rea*, this policy makes falling into the law's "trap for the innocent" almost a certainty.

arrest anyone who does not promptly obey. General Order 92-4, sec. VI.C.3.a., Pet. App. 72a. The ordinance's trigger is "loitering," which is defined as "to remain in any one place with no apparent purpose." Pet. App. 61a.

A law that prohibits remaining in a place without an "apparent purpose" is so amorphous that it provides no standard at all. People of ordinary intelligence cannot understand how to comply with its requirement. They do not and cannot know what they must do to demonstrate to an observing police officer that they are being purposeful at all times while in public. The City's ordinance, therefore, is vague "in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 614.

Courts have well recognized that the language of "no apparent purpose" fails to provide a standard for conduct. For example, in *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974), the Second Circuit struck down a New York criminal loitering statute, in part because the phrase "loiter[ing], remain[ing] or wander[ing] in or about a place *without apparent purpose*" was so vague as to make it impossible for a person to "conform his conduct" to it. *Id.* at 1172 (emphasis added). The Court observed that a person would be unable to discern whether he risked criminal responsibility by "taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building." *Id.* at 1172-73. Similarly, the Ninth Circuit struck down as vague a prohibition on "loiter[ing] or wander[ing] upon the streets or from place to place *without apparent purpose*." *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (emphasis added), *rev'd on other grounds*, 428 U.S. 465 (1976). And in *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), the court condemned as unconstitutionally vague a prohibition on "wander[ing] about the streets at late or unusual hours . . . without any visible or lawful business," in part because this



language "failed to point up the prohibited act . . . and thus did not differentiate conduct calculated to harm and that which is essentially innocent." *Id.* at 1104 (internal citations omitted); *see also Kirkwood v. Loeb*, 323 F. Supp. 611 (W.D. Tenn. 1971) (striking down as vague a prohibition on loitering without legitimate business).

The City asserts that people "can judge . . . when one's purpose for staying put is not obvious to others who may come along." Br. 30.[12] But this assertion is an affront to common sense. People do not, and cannot reasonably be expected to go through their daily lives being conscious of whether they are at all times adequately manifesting to others their purpose for being present in public. They can have no confidence they will not be publicly embarrassed by a dispersal order or suffer the trauma of arrest while they are at shopping centers, plazas, or countless other places open to the public in their city, or even in their own neighborhood.

This difficulty is compounded by the limitless scope of human activity and inactivity covered by the law. It sweeps within its purview much of the everyday, innocent behavior in which people engage: from stopping on the sidewalk to speak with a friend or relative, to a family standing outside their own apartment on a hot evening to cool off; from a couple of guys resting after a basketball game, to couples

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[12] The City claims that the "better-reasoned decisions in the lower courts conclude that the term 'loitering' has a common sense meaning that reasonable persons can apprehend." Br. 30 n. 18. But the cases cited for that proposition do not remotely suggest that a prohibition on "loitering" alone would be adequate for due process notice. Each one of those cases qualified "loiter" in critical ways that, at a minimum, provided more specificity and hence more fair waning than the term "loiter" itself. *See People v. Superior Court*, 758 P.2d 1046, 1049 (Cal. 1988) (statute criminalizing loitering "in or about any toilet open to the public *for the purpose of* engaging in or soliciting any lewd or lascivious or any unlawful act") (emphasis added); *State v. Armstrong*, 162 N.W.2d 357, 358 (Minn. 1968) (prohibiting loitering "*with intent* to solicit for purposes of prostitution") (emphasis added); *Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149 (7th Cir. 1994) (non-penal school disciplinary rule prohibiting loitering in an area immediately adjacent to school property).

sitting on a park bench discussing their relationship. While all of these activities are purposeful, under this law they would not have an "apparent purpose," so persons engaging in them would be subject to dispersal and arrest. In each of these circumstances "ordinary people" would not think that they would run afoul of a law prohibiting "loitering."

The Illinois Supreme Court illustrated the reach of the ordinance to these kinds of activities:

> People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Pet. App. 10a.[13] In view of the City Council's intent to create "an exceptionally broad ordinance" to be used "to sweep . . . gang members from the city streets," Pet. App. 16a, and the law's unqualified charge to disperse or arrest all persons without an apparent purpose, the Illinois Supreme Court properly interpreted the ordinance as applying to these situations.

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[13] The Illinois Supreme Court ruled the ordinance to be "not reasonably susceptible to a limiting construction." Pet. App. 16a. The court reasoned that the clear and unambiguous intent of the City Council was to write "an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." Pet. App. 16a. The Illinois Supreme Court's refusal to provide a narrowing construction of the ordinance is binding on this Court. As this Court has explained, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as thought it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21, 22 (1973) (quoting *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)); *see also Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997). Equally binding is the Illinois Supreme Court's interpretation of the City Council's legislative intent. *E.g., Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 605 (1st Cir. 1997); *Holdren v. Legursky*, 16 F.3d 57, 62 (4th Cir. 1994); *see also* Br. CANS 12-18.



The City has confirmed the correctness of the State court's conclusion that purposeful activities are subject to the ordinance's strictures through a series of examples of its enforcement policies.[14] In fact, the City established that it not only intended to include purposeful conduct within the ordinance's reach, but that it would be selective about what purposeful conduct it would sanction. Thus, two people "debating the constitutionality of the ordinance" (Pet. Br. Ill. S. Ct. 43), "a minister arguing with gang members" (Pet. Reply Br. Ill. Ct. App. at 22), "a community outreach employee who actively seeks out gang members to assist them in breaking free of the gang" (Pet. App. 57a), and "a street corner seminar with gang members on the merits of President Clinton's economic program" are all prohibited (Pet. Br. Tr. Ct. 26-27). But a gang member speaking with another person to request a charitable contribution to the gang (Pet. Br. Ill. S. Ct. 46; *see also* Br. 27) or a person soliciting a gang member's vote in an upcoming election (Pet. Reply Br. Ill. Ct. App. 21) would not be subject to prosecution under the ordinance. The City also has advised that a family that includes a suspected gang member is subject to dispersal and arrest even when "they are outside their apartment building getting some fresh air." Supp. R. II at 231.

As the City's own enforcement practices demonstrate, no person could possibly seek to conform his conduct to a consistent standard. The City ultimately makes subjective and arbitrary choices between purposes it deems apparent and

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[14] In this Court, the City has introduced a new standard -- a purpose must be "immediately discernable" to a police officer. Br. 38. This standard suggests a quick and superficial evaluation of conduct. *See* Part I.B, *infra*, regarding arbitrary and discriminatory enforcement.

It is worth noting that, in a passage attempting to provide yet another standard for understanding "no apparent purpose," the Solicitor General believes that, *in smoking a cigarette outside a "no-smoking" building*, a person will have an apparent purpose. Br. U.S. 12.

those that are "not apparent." In short, there is "no standard . . . at all." *Coates*, 402 U.S. at 614.[15]

The Illinois Supreme Court also condemned Chicago's law because its vague language, coupled with the legislature's intent, prohibited innocent conduct that ordinary persons would never reasonably suspect to be criminal. Pet. App. 9a Thus, the court noted that the ordinance "makes criminal activities which by modern standards are normally innocent." Pet. App. 9a (quoting *Papachristou*, 405 U.S. at 163).[16]

Both the City (Br. 31) and its *amici* (*e.g.*, Br. U.S. 15) argue that the Illinois Supreme Court's analysis was

[15] The City has continually attempted to distinguish some prohibited communications it characterizes as mere "chit chat" from other, permissible communications like soliciting charitable contributions for the gang or soliciting the votes of gang members. The City believes only the latter to be independently protected under the First Amendment (*e.g.*, Br. 27). While Respondents take exception to the City's proffered distinction, *see* Part III, *infra*, it has no relevance to the adequacy of the law's notice. To ordinary people, talking is talking. In both sets of circumstances people are speaking with each other in a public place. Neither the content of the communication (*e.g.*, "debating the constitutionality of the ordinance" versus asking for money), nor the identity of the speakers alters the participants' reasonable expectation that their purpose – communicating with another person in an historically recognized public forum – is apparent. The lack of a standard is amply illustrated in the record. Defendant Jesus Morales was observed to be "[t]alking to citizens on the street," but neither the arresting officer nor the trial court deemed that purpose to be sufficiently apparent to escape an arrest and conviction for the offense of gang loitering. Morales, R. 6.

[16] The state court went on to note that "[a]lthough persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter,' such term by itself is inadequate to inform a citizen of its criminal implications." Pet. App. 9a. This remark precisely explains why the City is wrong in asserting that "if the term 'loitering' were so vague that people ordinarily cannot tell when they are violating the law, all loitering laws would fall." Br. 30. The common sense meaning of "loiter" is simply too indefinite to mark a *common sense* distinction between criminal and non-criminal activity, and so prohibitions on "loitering" alone fail to provide fair warning. By contrast, a prohibition that contains the term "loiter," but that contains further detailed specification of the prohibited act – for example, by adding an element of intent to commit an additional illegal act, *e.g.*, *Luvene*, 827 P.2d 1374 – have at least the possibility of surviving vagueness scrutiny.



corrupted because, rather than determining vagueness, it actually was making a substantive decision about whether "innocent conduct" could be made criminal. They are wrong. The State court, like this Court in *Papachristou*, did no more than recognize that in such circumstances, where a law criminalizes previously innocent conduct, more definiteness in language is required.

This Court's "fair warning" jurisprudence, of which the notice requirement of the vagueness doctrine is a "related manifestation," *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997), long ago recognized this relationship between vague statutory language and the unreasonable risk it imposes on people engaging in conduct they reasonably believe to be innocent. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid [citation omitted], may be as much of a trap for the innocent as the laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952); *see also Cramp v. Board of Pub. Instruction*, 137 S.2d 828 (Fla. 1962).[17]

Nor was the Illinois Supreme Court in error when it considered in its evaluation of vagueness that the language of the City's loitering law did not distinguish between innocent acts and "conduct *calculated* to cause harm." Pet. App. 9a (emphasis added); *see also*. Br. 31; Br. U.S. 15. This Court has explicitly stated that in determining "[t]he degree of vagueness that the Constitution tolerates," a scienter requirement is relevant "especially with respect to the

[17] This Court's decision in *Hoffman Estates*, 445 U.S. at 497 n. 9, as cited by the Solicitor General (Br. U.S. 15), is not to the contrary. There, as the Solicitor General posits, the Court said simply that because the law in issue was not vague, the fact that innocent conduct was included within its scope was not a defect in clarity, but an issue of substantive due process. The Court never said that in evaluating the degree of definiteness required in a given penal statute it was improper to consider the normally innocent nature of the conduct sought to be criminalized.

adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499; *see also Colautti v. Franklin*, 439 U.S. 379, 395 (1979).[18] Indeed, a proper objective of a scienter requirement is to insure that a law does not "criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).[19]

In addition to lacking a standard for determining which purposes are apparent and which are not, the ordinance does not put persons of ordinary intelligence on notice as to *where* in Chicago they can remain in public. It is City policy not to disclose what areas are in fact designated for enforcement of the ordinance.[20] Thus, while not every block or corner in Chicago, presumably, is designated, persons of ordinary intelligence do not and cannot know where they can go in the City to avoid the ordinance's strictures. Nor can they know

[18] Though a scienter provision is not constitutionally required in every criminal statute, *Liparota*, 471 U.S. 419, its absence is a factor to be considered in determining if the statute provides constitutionally adequate notice.

[19] While the City has no trouble making findings as to the purpose of gang members in loitering ("WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas," Pet. App. 60a), it refuses to refine its broad and vaguely worded loitering law to target that very conduct – conduct that the City says it seeks to curb. Thus, "this is not a case where further precision of the statutory language is either impossible or impractical." *Kolender*, 461 U.S. at 361; *see* Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bull. No. 4 205, 219 (1967) ("it seems hardly disputable that some of these prohibitions are expressed with an imprecision that is *unnecessary* in furtherance of any legitimate regulatory objective").

[20] The City refused a request, pursuant to the Illinois Freedom of Information Act, to release information about the designated areas stating that "[d]issemination of [information regarding] the size of designated areas and their proximity to one another . . . would impair the Police Department's ability to fight crime . . . ." *American Civil Liberties Union v. City of Chicago*, No. 98 CH 10054 (Circuit Ct. Cook County), Memorandum in Support of Defendants' Motion for Summary Judgment and Request for Relief from the Index Requirement at 6.



what exactly to do in the event that they are ordered to move on. They cannot know where to move *to* because they cannot know what *other* areas are designated. Indeed, designations were changed "fairly often [because it was] . . . a fluid and changing kind of situation." Deposition of Thomas Needham at 11 ("Needham Dep.") (*American Civil Liberties Union v. City of Chicago*, *supra*, note 20). This only exacerbates the uncertainty. And the public cannot tell where they must move *from*, because there exists no guidance in the ordinance, in the General Order, or anywhere else indicating the geographical scope of the term "area."[21]

Finally, for all that appears, areas are designated with high frequency. The ordinance was enforced in 24 out of 25 Chicago police districts.[22] It was enforced on the streets, in parks, at schools, and in housing projects. Needham Dep. at 85. Moreover, the sixty-six defendants in this case were arrested in at least twenty-eight different locations. (Complaints of Respondents)[23] Based on this information, a person potentially affected by the ordinance could reasonably assume that that there are thousands of designated areas in the City of Chicago.

[21] In this respect, the ordinance is completely different from the *injunction* approved by the California Supreme Court in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997). That injunction, based on very specific and detailed findings about the criminal activities of certain named defendants in a specifically delineated four square block area of San Jose, prohibited those very individuals from returning to that delineated area. *Id.* at 282-83. Unlike those potentially within the reach of Chicago's ordinance, those subject to the San Jose injunction knew exactly where they could and could not go.

[22] Officer Louis Gaal, *Chicago Police Department Gang Investigation Section, Report on Gang Loitering Ordinance*, at 2-3 (Jan. 5, 1996).

[23] Information about the *Youkhana* defendants was derived from the complaints in the common law record. Clerks in the Illinois appellate and circuit courts were unable to locate records for many of the defendants in *Ramsey* and *Morales*, and as a result a common law record does not exist for them. Information as to these defendants was developed from an examination of the complaints on file at the office of the Clerk of the Circuit Court of Cook County.

The City further argues that even if the written terms of the ordinance do not provide sufficient notice of prohibited conduct, the problem is solved by the move-on, or dispersal, requirement of the law. Br. 30. The first flaw in the City's argument is that it treats the officer's order of dispersal as an event without practical or legal consequence. But dispersal is only permitted because it is authorized under the ordinance. An officer has no right in its absence to make such an order, as a result of which persons suffer at least a restraint on their right of free movement as well as the public humiliation and stigma of being banished from public. Consequently, to argue that one has a right to notice only before arrest but not before being required to leave a public place runs afoul of the most basic notion of due process.

This Court recently wrote that fair warning should be given "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Lanier*, 117 S. Ct. at 1219, 1220 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Here, the ordinance informs the person "of what the law intends to do" – order such person to disperse and remove himself from the area. What it fails to do is define with clarity what "certain line is passed." Thus, the failure to provide notice prior to requiring dispersal is, itself, a denial of fair warning.

A second flaw in the City's view about notice is that in reality it simply amounts to an end-run around this principle of fair warning. On the City's view, all a law would need to do to comport with due process is include a provision that a person will be told to disperse before being arrested and prosecuted for underlying conduct that itself is insufficiently defined by the law.

It is, of course, true, as the City points out, that persons will know what they need to do to avoid arrest under the ordinance – *i.e.*, obey the order. Br. 29. But given the



vagueness of the term "loiter," they will not know specifically what they did that triggered the order or what they need to do or refrain from doing in the future to avoid being dispersed from public places. Moreover, a person has a right to adequate notice so that he may determine whether the officer is misapplying a law and whether to refuse to disperse, submit peaceably to arrest, and defend the charges at trial. *Lambert v. California*, 355 U.S. 225, 228 (1957) ("Notice is sometimes essential so that the citizen has the chance to defend charges."). "[T]he touchstone [of fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time*, that the defendant's conduct was criminal," *Lanier*, 117 S. Ct. at 1219-20 (emphasis added), not that it displeased a police officer.

Because a move-on order, alone, can never inform individuals how to conform their behavior to the law in advance, such an order cannot, alone, cure a vague description of the underlying prohibited conduct. Consequently, the ordinance's dispersal feature does not serve this function.

Moreover, as the Illinois Supreme Court correctly observed, Pet. App. 13a, the City's position is directly inconsistent with this Court's teaching in *Shuttlesworth*. Under *Shuttlesworth*, a loitering law that only notifies a person that he acts illegally if he does not move on is unconstitutionally vague. *Shuttlesworth*, 382 U.S. at 90-91; *see also Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) ("[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.").

The City argues that *Colten v. Kentucky*, 407 U.S. 104 (1972), is "dispositive" as to the constitutionality of loitering ordinances that require move-on orders. Br. 29. It is mistaken. In *Colten*, this Court was confronted with a

disorderly conduct statute that, in contrast to the ordinance here, clearly defined the conduct that it made subject to an order of dispersal. According to the City's selective quotation, *Colten* says that "anyone 'should understand that he could be convicted . . . if he fails to obey an order to move on.'" Br. 29 (quoting *Colten*, 407 U.S. at 110). But what the City leaves out of this quotation says much more than what it left in.

The *Colten* law subjected one to arrest if he refused an order to disperse when he was congregating with others in a public place with intent to cause public inconvenience, annoyance, or alarm. In fact, what the Court wrote was that "[a]ny person *who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons* should understand that he could be convicted *under [this law]* . . . if he fails to obey an order to move on." *Colten*, 407 U.S. at 110 (emphases indicating passages omitted by City). The point of this passage is not that the move-on order cures any potential notice problem attending the definition of the underlying crime. Rather, the point is that the clarity of the underlying conduct legitimizes the move-on order.

Chicago's move-on order cannot save its ordinance precisely because the ordinance fails to define the underlying conduct purportedly prohibited. Nothing in *Colten* remotely suggests that this Court would approve Chicago's loitering law solely on the basis of its dispersal requirement.

Because Chicago's ordinance fails to describe the underlying conduct that it purports to prohibit in a manner that is understandable to a person of ordinary intelligence, it fails adequately to notify and is thus unconstitutionally vague.

### B. The Ordinance Encourages Arbitrary And Discriminatory Enforcement.



"[T]he most important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (internal quotation and citation omitted). Where a criminal statute fails to provide such minimal guidelines, it "may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (internal quotation and citation omitted). It furnishes a convenient tool for "'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)). [24]

In *Coates*, an ordinance that subjected the right of assembly to the unascertainable standard of whether persons assembling on any sidewalk were "conduct[ing] themselves in a manner annoying to persons passing by" could not stand, in part because its violation could "entirely depend upon whether or not a policemen [was] annoyed." 402 U.S. at 614. Similarly, in *Kolender*, a criminal statute that required persons who loitered to provide "'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*" was found to be vague. The statute, the Court held, "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute . . . ." 461 U.S. at 358. Like the ordinances in *Coates* and *Kolender*, Chicago's ordinance provides no standards by which a police

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[24] The City suggests that a serious commitment to community policing involves supporting "a greater leeway for state and local government to address signs of chronic disorder on the streets." Br. 15. While it is obscure what kind of "leeway" the City might have in mind, it is perfectly clear that the ordinance is, in fact, the antithesis of community policing and sound law enforcement practice. *See generally* Brief of Amici Curiae National Black Police Association, et al.

officer can determine what conduct it prohibits, thus inviting discriminatory enforcement. For this reason as well, it is unconstitutionally vague.

Despite the critical role that a police officer plays under the ordinance in determining when conduct lacks an apparent purpose, neither the ordinance nor the General Order provides any guidelines whatsoever for making that determination. Instead, the determination is left to the officer's subjective, wholly discretionary judgment. The City's "talking" examples dramatically illustrate that this is so. As noted, the City has indicated that some kinds of communications between persons appear on the individuals' sleeves, and others do not. Police officers are advised that persons conducting street corner seminars on economics or debating the constitutionality of this ordinance (or, presumably, the likely outcome of this case) have no "apparent purpose." Nor do ministers who are arguing with gang members. But police officers are also advised that gang members asking for donations and persons soliciting the votes of suspected gang members and others in their vicinity do have an "apparent purpose" and are to be left alone. The proposed distinction, which police officers are to make, is that some talk is "chit-chat" and other talk is not. Br. 21, 38. But how, conceivably, can police officers be expected to act on such a distinction? They can't *ask* what people are talking about. Even if they could command answers (which they cannot, *Kolender*, 461 U.S. at 360 n. 9), any answer would divulge what the individuals' *actual* purposes were. But the ordinance instructs police officers to determine only whether there is an *apparent* purpose; any *actual* purpose, the City has instructed, is "immaterial." Pet. Br. Ill. S. Ct. 52.

Police officers will not be able to distinguish ministers and political candidates from other people. They will not readily be able to determine the content of street corner conversations. Moreover, under the intermediate scrutiny



test advanced by the City, Br. 24-25, neither the content of the speech nor the identity of the speaker may be considered in making the chit-chat assessment. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See *infra* Section III.C.

In sum, police officers are left completely to their own devices, without standards, in determining when to enforce and when not to enforce the ordinance. Because the ordinance thus vests police officers with unlimited enforcement discretion, it is like the ordinances in *Coates* and *Kolender*, and is void for vagueness.

The City argues that the discretion of police officers is limited because the ordinance requires that the "officer 'reasonably believes' that the group contains a member of a criminal street gang." Br. 34. While "reasonable belief" is not, *in itself*, vague, whether a reasonable belief requirement, in a particular context, serves to sufficiently limit police discretion depends on what the reasonable belief must be *of*. As the Illinois Supreme Court correctly noted, even if the ordinance's reasonable belief provision objectively limited the discretion of police officers *with respect to who is a gang member*, it "does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime," Pet. App. 16a. That requirement, therefore, does nothing to save the ordinance.

Thus, the City's citations to *Terry* and *Boos*, Br. 35-36, are unavailing. In both of those cases, while "reasonable belief" was the level of certainty of criminal conduct required before an officer could act, the criminal conduct itself was sufficiently well defined. In fact, in *Boos*, it was the definiteness of the law's language that legitimized the move-on order – not the other way around. *Boos v. Barry*, 485 U.S. 312, 332 (1988).[25]

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[25] Finally, the inherent risk of arbitrary and discriminatory enforcement of the ordinance is vividly illustrated by the record of Jesus Morales, one of the defendants convicted of gang loitering. The arresting officer, Officer Frannie,

Because Chicago's ordinance, even in combination with the General Order, sets no standard with its prohibition on being in public with "no apparent purpose," it fails to provide guidance to police officers as to how to enforce it. Moreover, the enforcement policies of the City only highlight the arbitrariness of the law. No amount of tinkering with, or interpreting, *other* parts of the ordinance – either its putative restrictions on whom to arrest and where, or its requirement of a move-on order – will cure this underlying and fatal grant of unfettered discretion to police officers and thus, no amount of tinkering can save the ordinance from unconstitutionality.

admitted at trial that he originally approached Morales, who was standing with a group of Hispanic teenagers talking to citizens on the corner in a Caucasian neighborhood "because we wanted to know if they lived in the neighborhood or from the neighborhood." Morales, R. 6-7, 12-14. He did not recognize Morales or any of the others. *Id.* at 6. He did not ask any of them if they were gang members. *Id.* at 8, 10. While he said that he knew that they were gang members "from pass [sic] experience," *id.* at 8, he admitted that he made this judgment specifically as to Morales and at least one of the other teenagers solely on the basis that they were wearing blue and black clothing. *Id.* at 8, 10. A fair reading of Frannie's testimony – especially in light of his admission that he didn't recognize any of the teenagers – was that the "past experience" was simply his experience that the colors worn by these individuals were allegedly gang colors. (Instructively, the City asserts that some of the teenagers were self-admitted gang members, Br. 34 n. 21, but *it cites only to the arrest report*. That report – which was not offered in evidence – was fairly contradicted by Frannie's own testimony at trial that "there were no statements made [as to possible gang membership of any of the persons involved.]" *Id.* at 10.)

This example highlights the fact that the vague terms of this ordinance clear the way for a police officer or trier of fact to make decisions about whom to arrest and convict based on whim, personal animus or outright racial discrimination.



## II. THE ORDINANCE UNCONSTITUTIONALLY ABRIDGES THE RIGHT OF FREE MOVEMENT IN PUBLIC PLACES AND FORUMS.

### A. The Ordinance Burdens Respondents' Fundamental Right Of Free Movement In Public Places And Forums.

Chicago's ordinance abridges Respondents' fundamental right of free movement in public places and forums.[26] The Illinois Supreme Court correctly recognized that the ordinance burdens Respondents' freedom of movement, and held that the ordinance fails even the tolerant rational basis test applicable to all legislation. Pet. App. 18a-19a; *e.g.*, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). As explained below, the right of free movement is embodied in various Anglo-American charters of government and has been identified by, among others, Blackstone, Kent, and members of this Court dating back to Justice Washington and Chief Justice Taney. This history at once clarifies the fundamental nature of the right and refutes the City's claim that free movement under the Constitution is limited to "travel abroad or from one state to another." Br. 39. In fact, that history, along with this Court's free movement and right-to-travel case law, reveals that the right to move between

[26] Respondents challenge the ordinance insofar as it unconstitutionally affects the conduct both of suspected gang members and of persons not suspected to be gang members. Thirty-four Respondents were charged with "loitering" with "one or more" or "two or more" persons who were alleged to be members of a (sometimes named) criminal street gang. "The charges [in these cases] were framed in the words of the [ordinance] and so must be given a like construction." *Thornhill v. State of Alabama*, 310 U.S. 88, 96 (1940).

jurisdictions is an extension of the even more fundamental, if often implicit, right to move within them.[27]

The right of free movement is firmly grounded in our nation's history and tradition. The City's strawman rhetoric notwithstanding, this fundamental guarantee in no sense amounts to a "fundamental right to loiter." *E.g.*, Br. 39, 40-41. Rather, carefully described, it is the basic right of the individual to free movement in public places and forums, and the corollary right of the individual not to be banished from public places and forums if he chooses to remain there, so long as he is not threatening or engaging in otherwise unlawful conduct. This is the timeworn right identified by Blackstone: "[P]ersonal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct . . . ." 1 William Blackstone, *Commentaries* *134. The right includes going to, remaining in, and leaving, at one's own pleasure, such public places and forums as parks, plazas, streets, sidewalks, and the myriad other public spaces in and around

[27] Respondents' assertion of their fundamental right of free movement is fully consistent with *Graham v. Connor*, 490 U.S. 386 (1989), and cases following *Graham*. Although substantive due process cannot safeguard a liberty interest that already enjoys "an explicit source of constitutional protection," *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 (1998) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)), the analysis in a particular case cannot always be pigeonholed under the Bill of Rights, on one side, or the Fourteenth Amendment, on the other: "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993). In such cases, the Court "examine[s] each constitutional provision in turn," *Soldal*, 506 U.S. at 70, and "[t]he proper question is not which Amendment controls but whether [any] Amendment is violated." *James Daniel Good Real Property*, 510 U.S. at 50. Because Respondents' right of free movement is separate and independent of the speech and associational rights protected by the First Amendment, of the right not to be arrested except upon probable cause protected by the Fourth Amendment, and of the right not to be punished solely on the basis of status protected by the Eighth Amendment, it is properly analyzed as a substantive component of the Fourteenth Amendment.



one's neighborhood. Indeed, the free use of such places is, for many, an integral and indispensable part of daily urban life.[28]

Freedom of movement found perhaps its earliest expression in the Anglo-American legal tradition in the Magna Carta, which guaranteed free passage into and out of England. Magna Carta, ch. 42 (1215). On this side of the Atlantic, the Articles of Confederation provided that "the people of each State shall have free ingress and egress to and from any other State . . . ." Articles of Confederation, Art. IV. The Rhode Island Charter explicitly granted that colony's citizens the right "to passe and repasse with freedome, *into and through* the rest of the English Collonies . . . ." Z. Chafee, *Three Human Rights in the Constitution of 1787* 177 (1956) (emphasis added). And Kent wrote that "[e]very nation is bound, in time of peace, to grant a passage for lawful purpose over their lands, rivers, and seas to the people of other states . . . ." 1 James Kent, *Commentaries on American Law* *34. In *United States v. Wheeler*, 254 U.S. 281, 293 (1920), the Court summarized the early American tradition as follows: "In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, *to move at will from place to place therein*, and to have free ingress thereto and egress therefrom . . . ." (emphasis added).

[28] The City's suggestion that "loitering is the antithesis of travel," Br. 40, is shallow. An ordinance that prohibits otherwise law-abiding persons from pausing, resting, or standing still in public places manifestly affects one's freedom of movement. Just as a meaningful right of free speech must include a right not to speak (*e.g.*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942)), and a meaningful right of association must embrace a right not to associate (*e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977)), so a meaningful right of free movement must encompass a right to remain in one place.

Early formulations of the right of free movement made clear that free movement *within* frontiers was the foundation on which the right to travel *across* them was built. In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230), Justice Washington recognized the right of all citizens to "pass through, or to reside" in any state of the Union. Chief Justice Taney's dissenting opinion in *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849), later embraced by a majority of the Court in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868), is even more to the point: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States*." (Emphasis added.)[29]

In the nomenclature of substantive due process, the individual's ability to move freely "throughout the United States," *United States v. Guest*, 383 U.S. 745, 758 (1966), has been treated by this Court as an aspect of personal liberty "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).[30] In fact, the Court's treatment of free

[29] Rather than acknowledge the historical roots of the right of free movement, the City observes that loitering laws have a "considerable pedigree" tracing back to enactments in early England designed "to help feudal lords control their serfs . . . ." Br. 41. This Court recognized long ago, though, that "the theory of the Elizabethan poor laws no longer fits the facts." *Edwards v. California*, 314 U.S. 160, 174 (1941). Indeed, most of the feudal laws from which modern loitering laws descend are anathema today; the Statute of Laborers, for instance, was "designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972); *see generally* Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. Pa. L. Rev. 603 (1956).

[30] Although freedom of movement "has long been recognized as a basic right under the Constitution," *Guest*, 383 U.S. at 758, the Court has not always been clear as to the textual source of that right. *E.g.*, *Williams v. Fears*, 179 U.S. 270, 274 (1900) (due process clause of Fourteenth Amendment); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (due process clause of Fifth Amendment); *Edwards v. California*, 314 U.S. at 173-74 (commerce clause); *Twining v. New Jersey*, 211



movement as a facet of substantive due process dates back at least to *Williams v. Fears*, 179 U.S. 270, 274 (1900) where it explained:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

The Ninth Circuit struck a similar chord some thirty years later, when, in invalidating a state law that like Chicago's ordinance prohibited loitering in public places, it held:

> Personal liberty, which is guarantied to every citizen under our constitution and laws, consists of the right of locomotion – to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens.

*Territory of Hawaii v. Anduha*, 48 F.2d 171, 172 (9th Cir. 1931) (citation and quotations omitted); *see also Hague v. CIO*, 101 F.2d 774, 780 (3d Cir.) (affirming decree prohibiting city officials from banishing undesirable individuals from public places, and holding that "[i]ndividuals coming into or going about a city upon their lawful concerns must be allowed free locomotion upon the streets and public places"), *modified and aff'd on other grounds*, 307 U.S. 496 (1939).

U.S. 78, 97 (1908) (privileges or immunities clause of Fourteenth Amendment); *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (privileges and immunities clause of Article IV); *Crandall v. Nevada*, 73 U.S. at 43-44 (general principles of federalism). The Court's modern travel cases rest principally on the due process and equal protection components of the Fifth and Fourteenth Amendments. *E.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964) (due process); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (equal protection); *see also* John Paul Stevens, *The Third Branch of Liberty*, 41 U. Miami L. Rev. 277, 287-88 (1986).

*Williams*, *Anduha*, and *Hague* all followed logically from the expressed understanding of at least one framer of the Fourteenth Amendment, Representative Wilson, who quoted Blackstone in explaining that the "liberty" to be protected by the Due Process Clause "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct . . . ." Cong. Globe, 39th Cong., 1st Sess. 1119 (Mar. 1, 1866) (quoting 1 William Blackstone, *Commentaries* *134). Also apt was a question asked and answered by Senator Cowan during the Reconstruction debates: "What is that right of personal liberty? . . . [It is the] right to go where one pleases without restraint or hindrance on the part of any person." Cong. Globe, 39th Cong., 1st Sess. 1784 (Apr. 5, 1866).

This Court reaffirmed its grounding of free movement in substantive due process in *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), both of which involved individuals denied passports on the basis of their affiliations with the Communist Party.[31] In *Kent* 357 U.S. at 117-19, 130, the Court held that the Secretary of State did not have the statutory authority to deny passports on that basis. In so doing, it explained:

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law .... Freedom of movement across frontiers in either direction, *and inside frontiers as well*, was a part of our heritage. . . . *Freedom of movement is basic in our scheme of values.*

*Id.* at 126 (emphasis added). In *Aptheker*, 378 U.S. at 514, the Court struck down the statute that authorized the denials squarely on the basis of the Due Process Clause, quoting *Kent*, and holding that because the prohibition at issue was "supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe[,]" the statute "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."

The relevance of *Kent* and *Aptheker* to laws like Chicago's that restrict localized movement is demonstrated by *Kolender v. Lawson*, 461 U.S. 352 (1983). In *Kolender*, the Court struck down as impermissibly vague a state statute that required persons who loiter or wander on the streets to provide "credible and reliable" identification at the reques. of a police officer who has reasonable suspicion of criminal activity. *Id.* at 353-54. The Court relied explicitly on both *Kent* and *Aptheker* in concluding that the statute "implicate[d] consideration of the constitutional right to freedom of movement." *Id.* at 358.[32]

Chicago's ordinance imposes an even greater burden on freedom of movement than did the statute in *Kolender*. A police officer needs no suspicion whatsoever of criminal activity to take action under Chicago's ordinance. Indeed, if the officer reasonably believes that a group of individuals includes a gang member, he *must* order the group to disperse even if he *knows* that nothing untoward is afoot. An

[31] Relying on *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court in *Regan v. Wald*, 468 U.S. 222, 241-42 (1984), suggested that the right-to-travel aspects of *Kent* and *Aptheker* were "controlled" by First Amendment concerns. The *Zemel* Court, however, addressed *separately* the First Amendment and due process issues that had been raised in that case. 381 U.S. at 13-16 (due process); *id.* at 16-17 (First Amendment). In any event, to the extent *Kent* and *Aptheker* were driven, in part, by the selective, association-based nature of the regulations at issue, those regulations closely parallel Chicago's ordinance, which restricts only the movement of certain individuals on the basis of a disfavored association. *See* Part III, *infra*.

[32] The conclusion that the loitering regulation threatened the right of free movement was essential to the Court's holding in *Kolender* because the degree to which a challenged law "threatens to inhibit the exercise of constitutionally protected rights" is a crucial aspect of any vagueness determination, bearing directly on "the clarity that the Constitution demands of a law." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

individual challenged under the ordinance in *Kolender* could simply identify himself and avoid arrest; Chicago's ordinance, by contrast, provides no opportunity for its targets to explain their purposes, so they must in every case move on or face arrest.

In sum, freedom of movement encompasses more than the mere right, in the City's words, "to travel abroad or from one state to another." Br. 39. Although many of the Court's cases have involved burdens on travel between jurisdictions, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court has been clear that those cases treat the right to travel "in only a limited sense" and do not define the "ultimate scope" of the right. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974). Our nation's history and tradition, particularly as they have been applied by this Court in the context of substantive due process, demonstrate that the right to travel across borders is but an outgrowth of the much more basic right to travel within them. This was the conclusion of the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990). There, the court reviewed at length this Court's right-to-travel and substantive due process jurisprudence and concluded that "the right to move freely about one's neighborhood or town . . . is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history[,]'" and is therefore a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[33] Other lower courts agree with *Lutz*,[34] and to

[33] The *Lutz* court upheld the vehicular cruising ordinance before it by applying an intermediate standard of review that it analogized to First Amendment review of content-neutral time, place, and manner restrictions. *Lutz*, 899 F.2d at 269-70 & n. 40. The *Lutz* court's application of intermediate scrutiny is at loggerheads with this Court's approach to substantive due process, where infringements of fundamental rights necessarily fail constitutional scrutiny unless they are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In any event, intermediate scrutiny would be inappropriate in this case. The burden imposed by Chicago's ordinance – a blanket prohibition of certain persons appearing idle in public – dwarfs the



the extent this Court perceives any constitutional distinction between interstate and localized movement,[35] it has explicitly declined to draw it. *Memorial Hospital*, 415 U.S. at 255.[36]

Finally, the City contends that this Court's decisions in *Colten v. Kentucky*, 407 U.S. 104 (1972), and *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), "refuse to recognize a right to go – or remain – wherever one wants." Br. 40. Again, the City mischaracterizes the interest at stake. Clearly, the right of free movement in public places and forums does not afford to anyone an unqualified license to roam the public streets and parks completely free of any and all restrictions. As the *Lutz* court recognized, the right is implicated, and heightened scrutiny is warranted, only where a restriction imposes some nontrivial burden on movement. *Lutz*, 899 F.2d at 270 n. 41 ("Nothing we say today suggests that more conventional traffic regulations such as speed limits, stop signs, and the like need now be subjected to heightened judicial scrutiny."). Wherever lies the line between trivial and nontrivial burdens, requiring someone crossing the street at a busy intersection to

restriction of repetitive driving that was at issue in *Lutz*. Moreover, the Third Circuit itself recognized that where restrictions on movement distinguish among classes of travelers, as Chicago's does, the better analogy is to content-specific restrictions of speech, which command a more exacting standard of review. *Lutz*, 899 F.2d at 270 n. 40.

[34] *E.g.*, *Hutchins v. District of Columbia*, 144 F.3d 798, 806 (D.C. Cir. 1998) (petition for reh'g pending) (invalidating juvenile curfew ordinance), *aff'g*, 942 F. Supp. 665 (D.D.C. 1996); *id.* at 825 (Tatel, J., concurring in judgment); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (invalidating juvenile curfew ordinance); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (same).

[35] Several lower courts have found the distinction insupportable. *E.g.*, *Lutz*, 899 F.2d at 268; *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971); *cf. Cole v. Housing Authority of Newport*, 435 F.2d 807 (1st Cir. 1970) (invalidating municipal durational residency requirement for access to public housing as applied to applicant who moved from within state).

[36] Dicta in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993), indicate only that barriers erected by protesters in the vicinity of abortion clinics do not burden the right to *interstate* travel. The Court in *Bray* did not address the right of localized movement involved here.

wait for a "walk" signal lies clearly to one side, and forcing an otherwise law-abiding individual to remove himself from a public place, on pain of arrest, lies as clearly to the other.[37]

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The right of free movement in public places and forums, with its corollary right to remain in one place while there, is a prerogative of every individual that is both "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). That the City's ordinance severely burdens that right is beyond question. The ordinance subjects to dispersal or arrest every person who appears idle in public with another – wholly without regard to his actual purpose for being there, wholly without regard to whether he himself is a gang member, and wholly without regard to whether he has any reason to know or suspect that he is with a gang member – anytime a police officer suspects that he or his companion is a gang member. The areas the City has designated for enforcement of the ordinance are constantly subject to change, appear to be substantial, and in any event are closely kept secrets, *see* Part I.A, *supra*, so the citizenry cannot avail itself of even a single safe public haven within the city limits. Thus, the City's ordinance effectively

[37] As for *Colten* and *Stanglin*, neither of those cases considered the right of free movement that is implicated by Chicago's ordinance. *Stanglin* addressed only the First Amendment status of "chance encounters in dance halls," involving "hundreds of teenagers . . . ." 490 U.S. at 24-25. *Colten*, too, was primarily a First Amendment case. There, the Court sustained a conviction under a disorderly conduct statute that made unlawful the failure to obey a police order to disperse where such refusal was accompanied by a specific intent to "cause public inconvenience, annoyance or alarm." 407 U.S. at 108. Unlike Chicago's ordinance, the statute at issue in *Colten* required an individualized determination by police that a particular person harbored a specific intent to cause a public harm. Moreover, the defendant in *Colten* was free to move or cease moving anywhere he pleased other than the crowded roadside scene of the traffic accident from which he was ordered (five times over) to disperse; Chicago's ordinance, on the other hand, prospectively restricts movement throughout the city.



banishes from the public way a sizable portion of the population, and in so doing substantially abridges the fundamental right of free movement.

**B. The Ordinance Fails Constitutional Scrutiny Under Any Recognized Standard.**

Because the City's ordinance burdens fundamental rights, it is subject to strict scrutiny. "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *see also Miller v. Johnson*, 515 U.S. 900, 920 (1995). Thus, the ordinance must "substantially address, if not achieve, the avowed purpose." *Shaw v. Hunt*, 116 S. Ct. 1894, 1905 (1996); *see also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*") (the government must prove that its law "will in fact alleviate [the targeted] harms in a direct and material way").

Ameliorating the violence, drug-trafficking, and vandalism attributed to street gangs, *see* Br. 41-42, Pet. App. 60a, 65a, is a state interest of considerable moment. *E.g.*, *United States v. Salerno*, 481 U.S. 739, 748-49 (1987). Likewise, the interest in preserving the stability of neighborhoods, Br. 42, is worthy of "high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion). But the existence of even a serious problem does not justify any and all means that the City might devise to address it. Here, the City has utterly failed to establish that the ordinance satisfies any of the other requirements of strict scrutiny.

Indeed, because the City erroneously insists that its sweeping prohibition implicates no fundamental right, it advances no argument whatsoever that the ordinance could survive strict scrutiny. The City does, however, make much of the City Council's findings and of crime statistics regarding gang violence. And if required to defend its ordinance under strict scrutiny, the City no doubt would point

to the legislative findings and the crime statistics as proof. The City, however, overstates the significance of the findings and misstates the significance of the crime statistics.

As to the City Council's findings, it is well-established that legislative findings cannot, as a general proposition, sustain a law that is unconstitutional. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 394-96 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010, 1021, 1040 (1992); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773-74 (1973). The fact that the City Council concluded that a sufficient nexus existed between the ordinance and the evils of gang crime does not relieve this Court of its independent duty to determine whether the ordinance satisfies constitutional requirements. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 608-10 (1967); *see also Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1205 (1997) ("*Turner II*") (O'Connor, J., dissenting). As part of this duty, the Court should consider whether the Council's factual justifications for the law are based on substantial evidence and constitute reasonable inferences from such evidence. *Turner I*, 512 U.S. at 666; *Edenfield v. Fane*, 507 U.S. 761, 770-73 (1993).

It is perfectly clear from even a cursory review that the legislative findings are little more than a self-justifying preface to an ordinance driven more by political needs than law enforcement needs. For example, the City Council purports to find as a legislative "fact" that the City "has an interest in discouraging *all persons* from loitering in public places with criminal gang members." Pet. App. 61a (emphasis added). The hearing record is devoid of information that non–gang members who merely associate



with gang members, and are not themselves involved in any criminal activities, in any way further criminal activities or otherwise pose any threat to law-abiding citizens. In fact, the Council had ample evidence to develop findings that were quite the opposite of those it did develop regarding the potential effectiveness of the ordinance. *See* Statement, *supra*. The Council is certainly entitled to speculate, but its unsupported conjecture is not entitled to much weight when fundamental constitutional rights are at stake.

Nor do the crime statistics proffered by the City prove the ordinance's effectiveness. *E.g.*, Br. 16. To begin with, such statistics – and their potential for manipulation – must be approached with significant analytical caution. In recent years, Chicago, like most other cities, has realized a substantial downward trend in the commission of serious crimes. *See* Chicago Police Dep't, *Annual Report 1997*, at 14. The potential causes for this phenomenon are varied and their interrelationship hopelessly complex. Experts have identified factors such as Chicago's new system of community policing, the improved economy, high incarceration rates, demographic and population changes, gun seizures, stabilization of drug markets, nuisance and violence abatement programs, greater social stability, and decreases in drug and alcohol use.[38]

In addition to the practical difficulty – if not impossibility – of drawing any reliable conclusions in this area, the City's own data, when examined as a whole, supports the notion that the ordinance had no effect on gang-related homicides as

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[38] *E.g.*, Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Four: An Interim Report*, at 9 (Nov. 1997); National Institute of Justice, *Homicide in Eight U.S. Cities: Trends, Context, and Policy Implications*, at 3 (Dec. 1997); Fox Butterfield, *Reason for Dramatic Drop in Crime Puzzles the Experts*, N.Y. Times, Mar. 29, 1998.

much as it supports the City's proffered thesis.[39] *See* City of Chicago, *Gang and Narcotic Related Violent Crime: 1993-97* (June 1998). In fact, the record from the years that the ordinance was enforced is quite mixed: in 1994, gang related homicides increased faster than non–gang related homicides (27% to 3%); but in 1995, gang related homicides decreased faster than non–gang related homicides (26% to 4%). The record from the post-enforcement years also is mixed: in 1996, gang related homicides increased by 7% while non–gang related homicides decreased by 8%; whereas in 1997, gang related homicides decreased by 19% while non–gang related homicides increased by 1%. Significantly, taking the two post-enforcement years as a whole, gang related homicide decreased by 13%, while non–gang related homicide decreased by just 7%.[40]

Reason and logic make plain the exceedingly speculative fit between the City's ordinance and its objective of preventing gang criminality. The likelihood that providing police the ability to disperse a group that might contain a gang member will prevent the commission of a gang-related crime is remote. First and foremost, the fact that such an assemblage is poised to commit a crime is sheer speculation. In fact, nothing in the ordinance even requires such a determination in any given case. Second, the City acknowledges that gangs do not typically commit crimes in

[39] Instead of confronting the entirety of its own data set, the City selectively emphasizes the years that support its theory and ignores the years that undermine its theory. *See* Br. 16 & n.11.

[40] Similarly, the report of Chicago Police Officer Louis J. Gaal indicates that gang related homicides *increased* during the first two years of enforcement of the ordinance, and decreased only during the third. *See* Louis J. Gaal, *Statistics of Anti-Gang Loitering Ordinance* (Jan. 5, 1996). One commentator incorrectly cites the report of Officer Gaal as empirical evidence that gang-related homicides *decreased* during all three years of enforcement. *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 225 & n. 117 (1998). The City in turns cites this commentator's conclusions as evidence that the ordinance reduced gang crime. Br. 16 n. 11.



full view of the police. It is difficult to imagine that forcing a gang member contemplating criminal activity to move around the corner, into the alley, or into his house will in any significant number of cases prevent the contemplated crime from taking place. If the threat of incarceration that exists by virtue of laws already on the books is not a sufficient deterrent, it strains reason to pretend that the ability to disperse will be.

The ordinance fares just as poorly with respect to the least restrictive means requirement. Indeed, it is the antithesis of a narrowly drawn enactment. In the name of preventing gang crime, it sweeps up a vast array of innocent and, in many instances, constitutionally protected conduct. In any given case, whether enforcement of the ordinance prevents a crime from happening or whether it merely abridges one's fundamental rights is anybody's guess. And by gratuitously extending the ordinance to prohibit loitering even by non–gang members, the City Council guaranteed that the police could disperse or arrest myriad individuals engaged in harmless, legitimate, and often constitutionally protected activities and posing no threat whatsoever to the interests the ordinance purports to protect.[41]

The City defends this course as a valid "prophylactic" measure that "weigh[s] the benefits of prevention against the cost of prohibiting conduct that is sometimes innocent," Br. 43, but none of the cases the City cites supports its ordinance. To begin with, none of the City's "prophylaxis" cases involved liberty interests commensurate with those at stake in this case. In *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (cited at Br. 43), for example, the Court

[41] It was for these reasons that a number of individuals, including aldermen, expressed serious concerns about the ordinance causing the infringement of the basic freedoms of innocent people, both because of the vagueness of the ordinance and because innocent people might associate with individuals perceived to be gang members. *E.g.*, Supp. R. I at 11-13, 17-18, 37-38, 43-44, 97-98, 101-02; Supp. R. II at 14-15, 57, 69-71, 77, 79, 85-89, 219, 229-32.

explained that the challenged legislation – a state law that required employers to afford employees four hours paid leave on election day – was "in form a minimum wage requirement," and that the state legislatures "may within extremely broad limits control practices in the business-labor field . . . ."; *see also Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997) (cited at Br. 43) ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) (cited at Br. 43) ("These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.").

While "prophylactic" legislation can, if narrowly tailored, have the virtue of "prevent[ing] crime before it occurs," Br. 10, it likewise has the vice, duly noted by this Court, of "encompass[ing] more than the core activity prohibited." *United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997). For that reason, the Court has long recognized that prophylactic deprivations of personal liberty are inconsistent with our fundamental conceptions of criminal justice and are ripe for abuse by the authorities charged with their enforcement. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citations omitted); *Papachristou*, 405 U.S. at 171 ("The implicit presumption in these generalized vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment."); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2329 (1996) (Thomas, J., concurring in judgment and dissenting in part) ("Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they



sweep protected speech within their prohibitions."); accord, *e.g.*, *Thornhill v. State of Alabama*, 310 U.S. at 105.[42]

The contrast between Chicago's ordinance and the prophylactic curtailments of liberty that this Court has countenanced is stark. Under Chicago's scheme, every group of two or more people that contains even a single suspected gang member and remains, apparently without a purpose, in a single public place is deemed by legislative fiat to present such a danger to the community that all of its members must be ordered to disperse on pain of arrest and possible incarceration. The terms of the ordinance and its implementing administrative order are mandatory; no individualized assessment of dangerousness is required or, for that matter, permitted, and once an officer has determined that a suspected gang member is present, everyone – suspected gang members, strangers to the police, and even known non–gang members – is subject to dispersal and arrest. *See* Pet. App. 61a, 72a. As a result, the ordinance is wildly overinclusive. On its face, the ordinance applies to two friends waiting to meet a third for dinner; to a mother and her son getting a breath of fresh air on the sidewalk in front of their home; to high-school sweethearts holding hands on a park bench; to classmates hanging out across the street from their school during their lunch break; and to teammates waiting for an open basketball court (unless, of course, they

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[42] Indeed, the presumption underlying the City's ordinance – namely, that certain groups of individuals pose such a threat of future criminality that they should be ordered to disperse on pain of arrest and possible incarceration – should appear a familiar one to this Court. The Court has had several occasions to review laws that abridge personal liberty on the basis of some prediction of future dangerousness, and it has upheld such laws only under narrowly defined circumstances that bear no resemblance to those now at bar. Compare, *e.g.*, *Salerno*, 481 U.S. at 750-51, with *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992). Moreover, Chicago's ordinance paints with far broader a brush than the state law *struck down* in *Foucha*, which at least required a determination that the individual defendant posed some threat to the community before any deprivation of liberty could attach.

were paying enough attention to an ongoing game to be considered "apparent" spectators by onlooking police). Thus, even where enforcement is objectively limited to groups including at least one suspected gang member, the ordinance sweeps up conduct wholly unrelated to the violence, drug-trafficking, vandalism, and other "brazen" and "visibly lawless" behavior at which the City claims the ordinance is directed.

Finally, the fact that the City has ample alternative means of addressing the problems it claims the ordinance is needed to solve is proof positive that the ordinance is not the least restrictive means for advancing the interests at stake. As the Illinois Supreme Court correctly observed, "[m]any of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. 19a. Among other things, Illinois statutes proscribe "intimidation," 720 ILCS 5/12-6; "compelling organization membership of persons," 720 ILCS 5/12-6.1; "aggravated intimidation," 720 ILCS 720/6.2; "the assembly of two or more persons to do an unlawful act," 720 ILCS 5/2-1(2); and "mob action," 720 ILCS 5/25-1.[43] Such laws serve the same ends as the ordinance, but do so by means "directed with reasonable specificity toward the conduct to be prohibited." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *see also Foucha v. Louisiana*, 504 U.S. 71, 82 (1982) (striking down preventive detention scheme where, *inter alia*, the state failed to "explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with

[43] In addition to the host of criminal remedies available under state law, the City also has available to it civil remedies, directed specifically at gang-related activities, under the Illinois Streetgang Terrorism Omnibus Prevention Act, 740 ILCS 147/1, *et seq*.



patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.").

At the City Council hearings, this question – whether existing laws were adequate to deal with the problems of gang crime – was put to Deputy Superintendent Gerald Cooper, the lone representative of the Chicago Police Department and the only witness with extensive policing experience to testify at the hearings. Deputy Cooper's answer, on behalf of the City, is informative:

> ALDERMAN MOORE: Now, Alderman Steele has been asserting throughout the hearings that there are laws already existing on the books that address the problems that people have been testifying about today and Friday.
>
> Is that your assessment? Are there already laws and it's just a question of enforcement?
>
> MR. COOPER: I think there are already laws. I think there are already enough laws on the books at this point, criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance.
>
> But certainly, there is always going to be situations where there is no specific violation for or statute for, but for the most part and in the examples that people have been giving, I would think that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II at 181-82. Later, Deputy Cooper was asked "[b]ottomline, what is the police department's position on this ordinance? Do you folks want it or would you just prefer that it not be on the books?" Supp. R. II 185. Again, his response was instructive:

> Under the appropriate circumstances, the ordinance can be a viable tool for the police. What I am suggesting, however, is that there is much more that can be done rather than an additional law on the books, and I would

> prefer that the – or I would rather suggest or request the City Council, in its infinite wisdom, begin to look at the totality of the problem as opposed to looking at it from a one-dimensional point of view.

Supp. R. II at 185-86. Deputy Cooper's testimony reveals that separate and apart from the ordinance, the City has available to it "other, reasonable ways to achieve [its] goals with a lesser burden on constitutionally protected activity . . . ." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Chicago's ordinance is much more than "strong medicine." Br. 38. Whether it effectively prevents crime, promotes neighborhood stability, or furthers any other noteworthy state interest is a dubious proposition in and of itself. It is clear beyond peradventure though that the ordinance comes no where close to being a narrowly tailored measure to combat those societal ills.

◆ ◆ ◆ ◆ ◆

In any event, the ordinance is not "rationally related to legitimate government interests." *Glucksberg*, 117 S. Ct. at 2271. The Illinois Supreme Court struck down the Chicago ordinance on this basis, holding that the law was "utterly unreasonable." Pet App. 18a. The court reasoned that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime," without regard to "whether they are actually gang members or have committed any crime." *Id.* This ruling is sound and alone warrants affirmance.

The ordinance does not target the commission of crime, or even the conditions that lead to crime. Instead, it targets in blunderbuss fashion all persons who appear to be doing nothing in public, whether or not they are gang members, and whether or not they are committing or planning to commit a crime, merely because they happen at a particular moment to be with a suspected gang member. In this way, the law sweeps innumerable innocent activities and law-abiding



citizens off of the streets.

Thus, the ordinance is doubly irrational. First, it arbitrarily punishes countless individuals who have done nothing criminal – or, for that matter, suspicious, beyond appearing idle in public with a suspected gang member. *See Fenster v. Leary*, 229 N.E.2d 426, 430 (N.Y. 1967) (striking down vagrancy law under rationality review because law impermissibly targeted "suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected").

Second, by driving innocent persons from the public way, and by attacking the social bonds that might help gang members to live a better life, the ordinance destabilizes the very communities the City seeks to help. *See Hayes v. Municipal Court*, 487 P.2d 974, 980 (Okl. Ct. App. 1971) (striking down loitering law under rationality review, stating that "[t]o forbid people from being on public streets as a preventive measure rings of a totalitarian police state operated for the efficiency of the government and not in the interest of a free people. All citizens are justly concerned about crime. But, that concern must take rational expression and not become a mindless fear that erodes the rights of a free people.").

In short, the ordinance is so arbitrary and irrational that it cannot survive scrutiny under even a deferential standard of review.

## III. THE ORDINANCE IS SUBSTANTIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

It is hardly a controversial proposition that laws that interfere with citizens' peaceful enjoyment of public streets, sidewalks, and parks directly implicate all of the closely allied First Amendment rights of speech, assembly, and association. *E.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611,

615 (1971) (loitering ordinance directly implicates right of assembly); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (loitering ordinance directly implicates First Amendment freedoms). Nor is it surprising that an ordinance targeted at public assembly, which makes no effort to distinguish between lawful and unlawful gatherings, sweeps within its broad reach numerous associational activities that are not only innocent but constitutionally protected. From the City's point of view, the extraordinary breadth of the ordinance is the mark of its effectiveness. This Court, however, has taken a very different approach, repeatedly stressing that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

A law that lacks "precision of regulation" can be fatally overbroad in two distinct ways: "where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decision maker, and . . . where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (citations omitted).[44] Moreover, "[u]nder the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or

[44] The Court has explained that in assessing whether a legislative enactment burdens a substantial amount of protected activity, it "evaluate[s] the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 6 (1982). This is so because "ambiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks and alterations omitted).



undertake to have the law declared partially invalid.'" *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

The ordinance is unconstitutional under both strands of the overbreadth doctrine because it reaches vast amounts of constitutionally protected conduct, not only of the class of suspected gang members at whom it is purportedly aimed, but also of the millions in the general population of the City of Chicago. Further, the ordinance abridges these vital First Amendment freedoms in the very places in which they should be most vibrant – traditional public fora.

The overbreadth of Chicago's ordinance is neither speculative nor marginal. A mother talking with her child on the street corner will most likely be ordered to move on and possibly be arrested by a police officer who has reason to believe that her child belongs to a gang. Likewise, an anti-gang counselor will lose the public way as a site for locating and meeting with troubled youths.[45] Such results are not just irrational. They directly and substantially burden associational activities – both intimate and expressive – that the First Amendment carefully safeguards. Moreover, this is a paradigmatic case for invocation of the overbreadth doctrine precisely because the City has not even *attempted* in the ordinance to distinguish between gang members and non–gang members. And the latter are most likely to disperse – and sacrifice their associational rights – rather than risk arrest to preserve a later constitutional challenge. *E.g.*, *Jews for Jesus*, 482 U.S. at 574; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Public frustration with gang criminality cannot justify making criminals of all those who

[45] *E.g.*, Affidavit of Julio Matias, ¶¶ 4, 11 (Supp. R., Ex. A) (anti-gang counselor expressing fear of being arrested in connection with gang intervention activities). *See generally* Brief Amicus Curiae See Forever/The May Angelou Public Charter School.

may associate lawfully with suspected gang members any more than it can justify the ordinance's hopeless vagueness.

While the City pays lip service to the notion that the ordinance implicates no associational rights – *e.g.*, its hollow refrain that the ordinance "is directed at loitering, pure and simple," Br. 18 – it ultimately concedes, as it must, that the terms of the ordinance have the potential to reach activity protected by the First Amendment. Br. 22-23. But by cobbling together overly narrow constructions of the associational rights at issue with its unsubstantiated (and unsound) claim that the "no apparent purpose" feature of the ordinance will provide an *ad hoc* safe harbor for First Amendment activity, the City attempts to quantify the ordinance as covering only the "tiniest fraction" of protected activity. Br. 23. As shown below, the City's overbreadth construct is seriously at odds with law and human experience.

**A. The Ordinance Substantially Burdens Intimate Association.**

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

The Court has wisely eschewed identifying with precision the range of relationships protected by the right of intimate association, but it has had occasion to give examples. Among those that have been deemed entitled to protection are ones that attend the creation and sustenance of a family,



including marriage, childbirth, the raising and education of children, and the choice of living arrangements among relatives. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). At the same time, the Court has "not held that constitutional protection is restricted to relationships among family members." *Rotary Int'l*, 481 U.S. at 545. Examples of associations the Court has deemed unworthy of protection are "large business associations," *Roberts*, 468 U.S. at 620, and "chance encounters in dance halls," involving "hundreds of teenagers," *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989). In short, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620.

Even actual gang members – not to mention suspected gang members and non–gang members – have relationships that qualify for protection under the rubric of intimate association. So do their parents, siblings, spouses, and children. These persons – gang members, actual or suspected, on the one hand, and their parents, siblings, spouses, and children, on the other – are all entitled to the full measure of constitutional protection afforded their intimate relationships. Anyone familiar with urban life can appreciate that there is much in the way of constitutionally cognizable intimate association that takes place on the street corner, on the sidewalk, and in the neighborhood park. It is in these places that people, including gang members, spend important and meaningful time with parents, siblings, children, and neighbors. Indeed, in many neighborhoods where the sidewalk and streets often serve as an extension of the home,

this kind of activity is a vital piece of the fabric of life. But under the ordinance, the right to engage in this broad range of intimate – and innocent – association is subject to the Hobson's choice of dispersal or arrest. Both significantly burden the right of intimate association.

The City casually dismisses the ordinance's serious impingement on intimate associational rights by proclaiming that "there is nothing that is 'intimate' about loitering in public." Br. 21. But nothing in this Court's decisions suggests such a crabbed view of intimate association that would automatically deny protection to any activity that takes place out of doors. To the contrary, it is the nature of the association itself, not whether it happens to occur indoors or out, that triggers First Amendment protection. *See Roberts*, 468 U.S. at 618-19; *Rotary Int'l*, 481 U.S. at 545-46.[46] Nor does the reality of human experience jibe with the City's view. Additional examples abound. A suspected gang member, with other family members, watching his child at play; parents sitting in the park with their gang-member son; a father and son discussing the latter's job opportunities on the sidewalk in front of their home; even a suspected gang member proposing marriage to his girlfriend along Chicago's lakefront. The City's view not only belies an unfortunate class and cultural myopia, but also underscores forcefully the fact that the "no apparent purpose" feature of the ordinance does absolutely nothing to safeguard rights of intimate

[46] The City cites *Rotary International* and *Stanglin*. It cites *Rotary International* as authority for the broad proposition that "the right of intimate association does not extend to "activities carried on in the presence of strangers." Br. 21. The quoted portion is plucked out of context, however, and the *Rotary* Court merely considered the presence of strangers at – or, more accurately, the Rotary Club's policy of inviting of strangers to – its meetings as one factor among many that defeated the Club's claim that its activities were protected intimate association. The City cites *Stanglin* for the unremarkable proposition that the Constitution recognizes no generalized right of social association. Br. 21. Moreover, *Stanglin*, with its "chance encounters" among as many as 1,000 strangers, 490 U.S. at 22, is obviously of no particular guidance here.



association. If it is the City's position that intimate associational rights cannot by definition be exercised in public, *a fortiori* it will never be apparent to the City's police officers that an act of intimate association is occurring.

**B. The Ordinance Substantially Burdens Expressive Association.**

Chicago's ordinance also impinges the right of expressive association of both gang members and those who interact with them. This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. The City has all along conceded in this litigation, as it has had to, that the plain terms of the ordinance have the capacity to burden this right of expressive association. For example, the City acknowledged to the trial court that the ordinance could apply to members of a community outreach group who were attempting to persuade a gang member to leave his gang, Pet. App. 57a; to a minister arguing with gang members, Pet. Reply Br. Ill. App. Ct. 22; to a street corner seminar on President Clinton's economic programs, Pet. Br. Tr. Ct. 26-27; or to a debate over the constitutionality of the ordinance itself, Pet. Br. Ill. S. Ct. 43, so long as in each case a police officer reasonably believed a gang member to be present at the discussion.[47]

[47] The City has had occasion elsewhere to argue that gangs engage in expressive activity protected by the First Amendment. In seeking relief from an injunction restricting its investigations of First Amendment activities ("Decree"), the City represented to the court there as follows:

> Chicago gangs are ongoing organizations continually engaged in assorted criminal activity. However, because a gang may be or claim to be involved in First Amendment activity, the Decree inhibits the maintenance of records of gang membership . . . . Moreover, *gangs are increasingly engaged in political activities*. This means that investigations of gangs will increasingly implicate the Decree. Indeed, once a gang begins engaging in political

The fact that the ordinance reaches expressive association, and does so in a substantial way, is not some mere "hypothetical possibility." Br. 22. Organized social groups, from proselytizers to grassroots politicians, associate with gang members – often without outwardly apparent purposes. And as communities attempt to reclaim their troubled youth, gangs themselves have become increasingly engaged in community-based political activities that are traditionally protected as expressive association. *E.g.*, Pamela Constable, *"Peace Summit" Aims to Steer Young Latinos From Gang Violence*, Wash. Post, Apr. 4, 1996, at B5 (gang members formulating "peace plan" for Latino community development); Don Terry, *Chicago Gangs, Extending Turf, Turn to Politics*, N.Y. Times, Oct. 25, 1993, at A12 (gang involvement with health care, education, voter registration and supporting of candidates); *Gang Summit Ends With Call For Jobs*, L.A. Times, May 3, 1993, at A13 (policy positions of gang summit on employment and civil rights issues).[48]

activity, a substantial claim may be made that gang membership itself may be First Amendment information within the meaning of the decree.

Memorandum of City of Chicago in Support of its Motion to Modify the 1982 *Alliance* Consent Decree at 35, *Alliance to End Repression v. City of Chicago*, No. 74 C 3268 (N.D. Ill.) (filed 3/7/97) (citations omitted; emphasis added); *see also* Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 120-24 (1995) (detailing active participation of Chicago street gangs in electoral politics during past several decades).

[48] *See also* Marcia Slocum Greene, *Cleaning Up A D.C. Community's 'War Zone'; Joined In A New Battle, Old Rivals Work To Erase Signs of Simple City's Brutal Past*, Wash. Post, Feb. 26, 1997, at B1; Marylynne Pitz, *Survivors of Gang Warfare Were Abundant At the Rally; Members of 4 Gangs Go To Rally For Peace*, Pittsburgh Post-Gazette, Sept. 3, 1996, at B1; George Papajohn, *Gangs Aren't Rookies in City Politics*, Chi. Trib., March 31, 1995, sec. 1 at 1; Doug Smith, *Valley Gang Members Join To Mark Peace Anniversary*, L.A. Times, Oct. 30, 1994, at B1; George Papajohn, *A Peek Behind Gang's Talk of Political Action*, Chi. Trib., Oct. 2, 1994, sec. 2 at 1; John Kass & George Papajohn, *Group's Rapid Success a Real Inside Story*, Chi. Trib., July 24, 1994, sec. 4 at 1; *Jackson Tells Gang Members They're At Cutting Edge of Civil Rights*



The ordinance is all the more inimical to the First Amendment because the areas most affected by the ordinance – public streets, sidewalks, and parks – are the quintessential public fora. *United States v. Grace*, 461 U.S. 171, 180 (1993); *Boos v. Barry*, 485 U.S. 312, 318 (1988). Restrictions on the liberties guaranteed by the First Amendment are most abhorrent within those areas that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)); *see also International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678-79; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). Public streets, the Court has held, are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Again, the reality of the human experience in urban neighborhoods – particularly in poor and minority areas – forcefully illustrates the wide net that the ordinance casts over expressive association. The streets and sidewalks do not function exclusively as fora for large-scale rallies or formal demonstrations. Most discussion of matters of public interest and concern is informal and private; neighbors discussing the state of city services, the conditions of alleys, the arrival of Asian beetles, or their views about street gangs are all associating for expressive purposes but will rarely exhibit a purpose "apparent" to an objective observer. In fact, formal demonstrations, marches, and parades are few in number compared to the everyday use of the streets for expressive association. But the ordinance operates to burden this

*Push*, L.A. Times, Oct. 25, 1993, at A16; *Gang Members Turn From Streets to Talk of Peace*, N.Y. Times, May 2, 1993, at 1.

infinite variety of expressive association in one of two ways: dispersal or arrest.

The ordinance's burden on associational rights is further exacerbated by its "guilt by association" feature. As explained in *Healy v. James*, 408 U.S. 169, 186 (1972), government cannot "impos[e] criminal sanctions or deny[] rights and privileges solely because of a citizen's association with an unpopular organization . . . [G]uilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." *Id.* at 186 (citations and internal quotation marks omitted); *see also Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) ("The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel."); *cf. Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997) (Kozinski, J.) (rejecting as "guilt by association" the argument that gang membership alone is evidence that defendant aided and abetted a murder).[49]

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[49] Contrary to petitioner's suggestion, *e.g.*, Br. 5, n. 3; Br. 35, n. 23, the ordinance in this respect bears little resemblance to other statutory schemes that are directed against ongoing criminal enterprises. For example, there is no criminal liability under the substantive provision of the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.*, unless the government can prove that an employee or associate of a criminal enterprise conducted or participated in the enterprise's affairs "through a pattern of racketeering activity," *i.e.*, through the commission of two or more enumerated crimes. *Id.* § 1962(c). Nor is there liability under the conspiracy provision of RICO, *id.* § 1962(d), without proof of the defendant's "inten[t] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . ." *Salinas v. United States*, 118 S. Ct. 469, 477 (1997). State laws that target gang membership likewise require proof of criminal conduct or intent before imposing punishment. *E.g.*, Cal. Penal Code § 186.22(a) (California Street Terrorism Enforcement and Prevention ("STEP") Act does not punish gang membership unless member had "knowledge" that gang has engaged in "pattern of criminal gang activity," and member "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"); *id.* at § 186.22(b)(1) (STEP Act does not enhance criminal sentence unless gang member committed felony "for the benefit of, at the direction of, or in association with any criminal street gang," and "with the specific intent to promote, further, or assist in any criminal conduct by gang members"); Iowa Code § 723A.2 (Iowa Criminal Street Gang Statute does not punish gang membership unless member "willfully aids and abets any criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang"); *Jackson v. State of Indiana*, 634 N.E.2d 532, 534 (Ind. Ct. App. 1994) (Indiana Gang Statute, Ind. Stat. Ann. §35-45-9-3, does not punish gang membership without proof of participation "with knowledge of the gang's illegal advocacy of felonies or batteries," and "with specific intent to further, facilitate, or accomplish the substantive criminal conduct"); *see also* 740 ILCS 147/10 (Illinois Streetgang Terrorism Omnibus Prevention Act permits civil action against gang member for equitable and monetary relief only where member "knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity").



In its effort to dismiss the substantial burden the ordinance places on expressive association, the City advances two fictions. First, it inexplicably quantifies the amount of expressive association at stake as the "tiniest fraction." Br. 23. As support for this extraordinary conclusion, the City tells us that none of the Respondents was doing "anything [ ] protected by the First Amendment." Br. 22. The record of course furnishes no particularized facts to support this sweeping assertion. Moreover, even if the City's assertion were true, it would completely beg the question of facial overbreadth since that question concerns not the details of Respondents' arrests but rather whether there is "a significant *potential* for unconstitutional application of the ordinance." *City of Houston v. Hill*, 482 U.S. 451, 458 n. 6 (1987) (emphasis in original); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth v. City of Birmingham*,

382 U.S. 87 (1965). On that question a far more pertinent statistic is the City's assertion that its officers issued some 45,000 dispersal orders that were obeyed under the authority of the ordinance. Br. 16.

The City's second attempt to trivialize the ordinance's burden on expression is its assurance that most of whatever little expressive association transpires on the streets of Chicago will have an "apparent purpose." Agreement from this Court on this proposition would amount to an extraordinary retreat from the teaching of this Court's jurisprudence in this area. This point cannot be overemphasized. Conditioning the exercise of a fundamental right such as expressive association upon the "moment-to-moment judgment of the policeman on his beat," *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)); *see also Kolender*, 461 U.S. at 358; *Shuttlesworth*, 382 U.S. at 90, is something this Court has vigilantly guarded against. While anyone will surely recognize a parade or a formal demonstration for what it is, the opportunities for expressive association beyond these isolated, large-scale events are enormous, not just some "tiny fraction." And in that gulf of expressive opportunities, the City's conjecture that citizens' purposes will be apparent to the police simply is not sufficient protection. The preservation of First Amendment freedoms should not be made to hang in the balance of the ability of individual police officers to divine the purposes of persons exercising those rights.[50]

[50] The avowed target of Chicago's ordinance is criminal street gang activity. However if the City's law is upheld, any ordinance using the City's definition of "criminal street gang" – which, in the City's words, "largely track[s] the definition of an 'enterprise' . . . in the federal racketeering statute" (Br. 4-5 n. 3) – could be used prospectively to subject members of countless grass roots advocacy organizations to similar restraints on speech and association without any individualized judicial finding of wrongdoing. Groups such as ADEPT,



### C. The City Wrongly Asserts That The Ordinance Passes Scrutiny As An Incidental Burden On First Amendment Rights.

Because the ordinance substantially burdens First Amendment rights, it is overbroad and invalid on its face. *Jews for Jesus*, 482 U.S. at 574. Starting from the contrary – and faulty – premise that the ordinance only burdens speech incidentally, the City argues that the ordinance should be subjected to an intermediate level of scrutiny like that used in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), or for time, place, and manner restrictions, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and that the ordinance easily satisfies such scrutiny. Br. 24-25. The only plausible explanation for the City's use of the intermediate test is its recognition that the ordinance flunks strict scrutiny, which it plainly does. *See* Part II.B, *supra*.

Even if the law warranted scrutiny of the ordinance as a mere time, place, and manner restriction, the ordinance would not survive. Government may impose time, place, and manner regulations "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Relatedly, under the *O'Brien* test, "the governmental interest must be unconnected to

Operation Rescue, Greenpeace, ACT-UP, and hundreds of other political organizations whose members may have engaged in past criminal activities – such as mob action, 720 ILCS 5/25-1(2) – as part of a course of civil disobedience would be subject to arrest and prosecution anytime two of their members gather in public with "no apparent purpose." *Cf., National Organization of Women, Inc. v. Scheidler*, No. 86 C 7888 (N.D. Ill.) (jury finding that anti-abortion group, Pro-Life Action Network, was RICO enterprise and that anti-abortion groups and protesters, including Operation Rescue, participated in its operation), *on remand from* 510 U.S. 249 (1994).

expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). The ordinance meets none of these requirements.

Here, the City's interest is not unconnected to association. Rather, it *targets* association, and includes within its sweep myriad forms that are both entirely innocent and constitutionally protected. Nor is the ordinance content-neutral. Persons subject to the ordinance are identified by their status as purported gang members. With respect to persons who are not gang members, but wish to engage in various forms of expression and association with gang members, the ordinance similarly imposes a content-based disability forbidden in the decisions of this Court. *Simon & Schuster*, 502 U.S. at 115-16 (identity of speaker not basis for content-based disincentives on expression); *Boos*, 485 U.S. at 312 (ban on particular class of derogatory signs); *Police Department v. Mosley*, 408 U.S. 92 (1972) (ban on all but labor picketing is content-based); *Bellotti*, 435 U.S. at 784-85 (legislature not permitted to dictate which speakers may address public issue). Contrary to the City's position, Br. 25, the conclusion that the ordinance is content-based flows from its selective designation of persons disqualified from speaking and associating on the public ways, not from its impact on or relation to particular private conversations.

Nor is the ordinance narrowly tailored to serve the City's substantial interests in crime prevention and maintenance of public order. In a variety of situations, this Court has held that restrictions on expression and association are not narrowly drawn where government can enact or enforce specific laws addressing particular crimes or civil ills. Of particular note is *DeJonge v. State of Oregon*, 299 U.S. 353, 365 (1937), where the Court directed the State to enforce valid laws protecting public order in preference to criminalizing peaceable assembly. *See also Village of Schaumburg*, 444 U.S. at 636-37 (charitable solicitation; crime and fraud); *Coates*, 402 U.S. at 614 (assembly and



association; traffic and public order laws); *Schneider v. State of New Jersey*, 308 U.S. 147, 164 (1939) (leafletting; littering laws).

Finally, denial of the public ways as a gathering place for expression and association does not leave open ample alternative channels for communication. Gang members and those who would associate with them cannot be confined to formal modes of expression or to a state of constant movement. Br. 27. They are entitled, as are any other citizens, to use the streets for informal assembly, exchanging ideas, and discussing public questions. *Hague v. CIO*, 307 U.S. 496, 515-516 (1939); *see also United States v. Kokinda*, 497 U.S. 720, 728 (1990) (public sidewalk as facilitating daily life and commerce of neighborhood or city). When expression and association are banned in specific locations other than quintessential public forums, the public streets are often the only alternative. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (state fairgrounds); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (posting signs prohibited; leafletting on street allowed); *Frisby*, 487 U.S. at 483 (single-home targeting banned; forum otherwise available).[51]

So long as gang members and those who would associate with them behave lawfully on the public ways, their rights,

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[51] In arguing that the ordinance leaves open adequate alternative channels for communication, the City claims that the ordinance will only be enforced in those "limited areas" designated pursuant to General Order 92-4. Br. 28. At the same time, despite a request under the Illinois Freedom of Information Act and subsequent FOIA litigation, the City has refused to disclose to the public which areas have been so designated, claiming that to do so would impair the ability of the police to fight crime. *See* note 20, *supra*. Nevertheless, it is clear that the areas designated are substantial; as noted above, the ordinance was enforced in twenty-four of twenty-five police districts, and was enforced on streets, in parks, at schools, and at housing projects. *See* p. 25, *supra*. In these circumstances, no one will ever know where in the City he can safely stand with others in public, or even where in public he can safely remove to if ordered under the ordinance to disperse; the "alternative channels" cited by the City are thus illusory.

like those of the general public, should be subject to the rule long applied by this Court. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1989)).

## IV. THE ORDINANCE VIOLATES THE EIGHTH AMENDMENT BY CRIMINALIZING STATUS.

Criminalization of status alone imposes cruel and unusual punishment in violation of the Eighth Amendment. *Robinson v. California*, 370 U.S. 660, 666-68 (1962). Accordingly, "criminal penalties may be inflicted only if the accused . . . has committed some *actus reus*." *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion). Thus, while the state may criminalize the *conduct* of public drunkenness, even when committed by an alcoholic, *Powell*, 392 U.S. at 532, it may not criminalize the *status* of narcotics addiction. *Robinson*, 370 U.S. at 666-67. Together, *Robinson* and *Powell* prohibit the use of the penal power of the state against persons, defined by their status, solely upon the belief that they are more prone to criminal behavior than others.

Chicago's ordinance unconstitutionally criminalizes both the status of gang membership, and the status of being an associate of a gang member (broadly defined by the ordinance to include anyone who for any reason is with a suspected gang member). The offense the ordinance purports to create lacks an *actus reus* – the foundation of all criminal statutes that ensures that penalties are inflicted only upon those who have committed some culpable act. *See* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, §§ 3.2(b), 3.2(c), at 273-78 (1986). The ordinance is thus constitutionally infirm.

The City argues that the ordinance proscribes the "act" of loitering. Br. 45. However, failure to exhibit an apparent



purpose at every moment that one is in public with others cannot be the *actus reus* needed to save the ordinance. This "act" might include such reflexive, everyday conduct as talking, strolling, eating, sitting on a park bench, waiting to meet a friend, waiting outside a laundromat for clothes to dry, waiting to hail a cab, resting during a jog, waiting in a doorway for the rain to stop, or just enjoying the fresh air on a hot day. Everyone is certain to engage in such unavoidable conduct. In many communities, including Chicago's lower income neighborhoods, such public behavior is virtually involuntary: school might be out, jobs might be scarce, home might be without air conditioning, and banishment from the public way might mean loss of all social support and resources. *Cf. Pottinger v. Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual"); *Church v. Huntsville*, No. 93-C-1239-S; 1993 WL 646401, *1 (N.D. Ala. Sept. 25, 1993) (enjoining policy of arresting persons "solely because of their status as homeless persons, for walking, talking, sleeping, or gathering in parks or other public places"), *vacated on other grounds*, 30 F.3d 1332, 1347 (11th Cir. 1994).

*Robinson* would be rendered a dead letter if *any* act, no matter how automatic and ubiquitous, could constitutionalize what is otherwise an unconstitutional status crime. The City might criminalize the "act" of sitting on a park bench when performed by a homeless person, or the "act" of getting out of bed in the morning when committed by an alcoholic. By the City's reasoning, the statute in *Robinson* might itself have been saved had the state simply explained that it was criminalizing not the status of drug addiction, but the "act" of failing to leave the State of California.

Here, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it

occurs," Br. 10, 14 – which is to say, the ordinance punishes a commonplace activity in an effort to remove individuals of a particular status from the public way before they commit a crime.[52] Of course, as to the associates of suspected gang members, the nexus between status and possible criminality is especially weak. *See Scales v. United States*, 367 U.S. 203, 224-25 (1961) ("In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt . . . ."). In short, appearing to do nothing cannot supply the necessary *actus reus*.[53]

The City also argues that the ordinance proscribes the "act" of disobeying a police order to move on. Br. 45. However, disobedience of an unconstitutional police order cannot supply the *actus reus* necessary to save the ordinance. *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963); *cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965). Thus, neither of the so-called acts identified by the City can camouflage the fact that the ordinance impermissibly punishes the status of gang membership. As the Illinois Appellate Court concluded, "the Chicago

[52] The selective, status-based operation of the ordinance defeats any comparison of this case to *Powell*, where all persons, alcoholic or not, were prohibited from committing the harmful act of public drunkenness. 392 U.S. at 532-35.

[53] The very cases cited by the City contradict its claim that "loitering alone can constitute the required conduct." Br. 45 n. 26. In fact, each case upheld a loitering ban on the grounds that the law also required proof of specific intent to commit a separate and criminal act. *See People v. Superior Court*, 758 P.2d 1046, 1049-50 (Cal. 1988) (ban on loitering "for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act"); *State v. Armstrong*, 162 N.W.2d 357, 360 (Minn. 1968) (ban on loitering with the "proved intent to commit an unlawful act"); *City of Tacoma v. Luvene*, 827 P.2d 1374, 1383 (Wash. 1992) (drug loitering ordinance interpreted to require proof of "actual intent" to commit a drug crime).



ordinance prohibits gang members from loitering because they are gang members, not because they are loitering." Pet. App. 34a-35a.

Chicago's ordinance has little in common with the other statutes discussed by the City. Br. 45-46. Statutory rape laws, unlike the ordinance, prohibit an *actus reus*: sexual relations with an underage individual is an affirmative act. Equally inapposite is the federal ban on firearm possession by a convicted felon, upheld in *Lewis v. United States*, 445 U.S. 55 (1980). The act of acquiring and possessing a gun is a far cry from the "act" of being in public without an apparent purpose. Indeed, the purchase and ownership of firearms is heavily regulated at virtually all levels of government, largely because of the self-evident dangers guns pose to society. Chicago's ordinance is more like a law that punishes convicted felons for inadvertently being near a gun store, whether or not they actually purchase a gun. Furthermore, this Court repeatedly has recognized that government may restrict the activities of convicted felons, *e.g.*, *id.* at 66; the status of criminal conviction is, accordingly, constitutionally unique.

The City may, without doubt, criminalize behavior that creates "health and safety hazards." Br. 46 (quoting *Powell*, 392 U.S. at 532). What it cannot constitutionally do is impose criminal penalties solely on the basis of status combined with some pervasive, unremarkable activity which is practically impossible for any person not to engage in. Accordingly, Chicago's ordinance violates the Eighth Amendment by banishing from the public way a class of individuals defined by their status and not their actions.

## V. THE ORDINANCE VIOLATES THE FOURTH AMENDMENT BY REQUIRING ARREST WITHOUT PROBABLE CAUSE.

Chicago's ordinance is, in the words of the Appellate Court of Illinois, "a transparent attempt to avoid the probable cause requirement." Br. 35a. Its clear purpose is to authorize the arrest of gang members – and anyone with a gang member[54] – upon mere suspicion of future criminal activity, based on their affiliations with groups whose members have committed crimes in the past. The City admits that it passed the ordinance because, while gang members are responsible for "violence, drug-dealing and vandalism," they are able to "avoid arrest by committing no offense punishable under existing laws when they know the police are present." Pet. App. 60a. Indeed, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it occurs." Br. 10, 14.

In short, the ordinance makes it a crime to look suspicious. It authorizes arrest based upon a generic suspicion that someone might commit some unspecified crime sometime in the future if he is allowed to continue to associate in public with another who is suspected of belonging to a gang. This violates core Fourth Amendment principles. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) ("It is basic that an arrest . . . must stand upon firmer ground than mere suspicion . . . ."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) ("Arresting a person on suspicion . . . is foreign to our system, even when the arrest is for past criminality."). Indeed, the Court determined in *Terry v. Ohio*, 392 U.S. 1 (1968), that if a police officer has only a reasonable suspicion that a crime is afoot, the Fourth Amendment permits the officer only to stop and frisk

[54] *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").



the suspect. The Chicago ordinance would subvert this "narrowly drawn," *id.* at 27, exception to the requirement of probable cause.

This Court repeatedly has struck down laws that, like Chicago's ordinance, attempt to end run the requirements of the Fourth Amendment. *Berger v. State of New York*, 388 U.S. 41 (1967) (statute authorizing eavesdropping upon mere "reasonable belief"); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465 (1979) (statute authorizing search of every person arriving in Puerto Rico); *Payton v. New York*, 445 U.S. 573 (1980) (statute authorizing warrantless entry into private residences to make felony arrests); *see also Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) ("Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment.").

Moreover, lower courts have held that certain loitering laws violate the Fourth Amendment, reasoning that "the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct." *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1172 (2nd Cir. 1974), *aff'd on other grounds, Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *see also Powell v. Stone*, 507 F.2d 93, 96 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976); *Farber v. Rochford*, 407 F. Supp. 529, 533 (N.D. Ill. 1975). Similar criminal statutes have also been invalidated by lower courts on this basis. *E.g., Hall v. United States*, 459 F.2d 831 (D.C. Cir. 1971) (striking down prohibition of vagrant's failure to give good account of himself); *People v. DeFillippo*, 262 N.W.2d 921, 924 (Mich. App. Ct. 1977) (striking down prohibition of refusal to produce identification during a *Terry* stop), *rev'd on other grounds*, 443 U.S. 31 (1979).

While the City claims that its police officers will have probable cause to believe that the ordinance has been violated, Br. 49 – *i.e.*, that a person is doing nothing in the

presence of a suspected gang member – legislation "may not . . . authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York*, 392 U.S. 40, 61 (1968); *see also Kolender v. Lawson*, 461 U.S. 352, 369 (1983) (Brennan, J., concurring) ("By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime," legislation violated the Fourth Amendment).[55]

In short, the City cannot be allowed to make suspicion based on mere association a basis for arrest and incarceration without an individualized determination of probable cause that an actual crime has been committed.

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[55] Not to the contrary are three cases cited by the City. Br. 49 & n. 29. In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), this Court recognized a good-faith exception to the exclusionary rule for arrests based on a statute subsequently held unconstitutional. As this Court explained in *Illinois v. Krull*, 480 U.S. 340, 355 n. 12 (1987), there is a difference between those Fourth Amendment cases that "simply evaluate[] the constitutionality of particular statutes" (e.g., *Berger* and *Torres*), and those that address "whether a good-faith exception to the exclusionary rule should be recognized" (e.g., *DeFillippo* and the case then at bar). Indeed, *DeFillippo* rested in significant part on the doctrine of qualified immunity, *id.* at 38 (discussing *Pierson v. Ray*, 386 U.S. 547 (1967)), which affords public officials a good-faith defense to § 1983 damages actions, even after a determination that they violated the Constitution. *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n. 5 (1998). Here, of course, the issue is the constitutionality of Chicago's ordinance, and not the good faith of the police officers who enforced it.

In *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 572 (Wis.), *cert. denied*, 493 U.S. 858 (1989), the court upheld a loitering ordinance that, unlike Chicago's ordinance, did not criminalize suspicion. Rather, it required an individualized determination of an immediate threat to public safety, and allowed the individuals to avoid arrest by explaining themselves. And in *Walters v. Barry*, 711 F. Supp. 1125, 1142 (D.D.C. 1989), the court rejected a Fourth Amendment challenge to a juvenile curfew that again, unlike the Chicago ordinance, did not criminalize suspicion. Rather, it sought under the *parens patriae* power of the state to protect the well-being of juveniles, did not authorize arrest, and did not allow punishment by incarceration.



## CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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